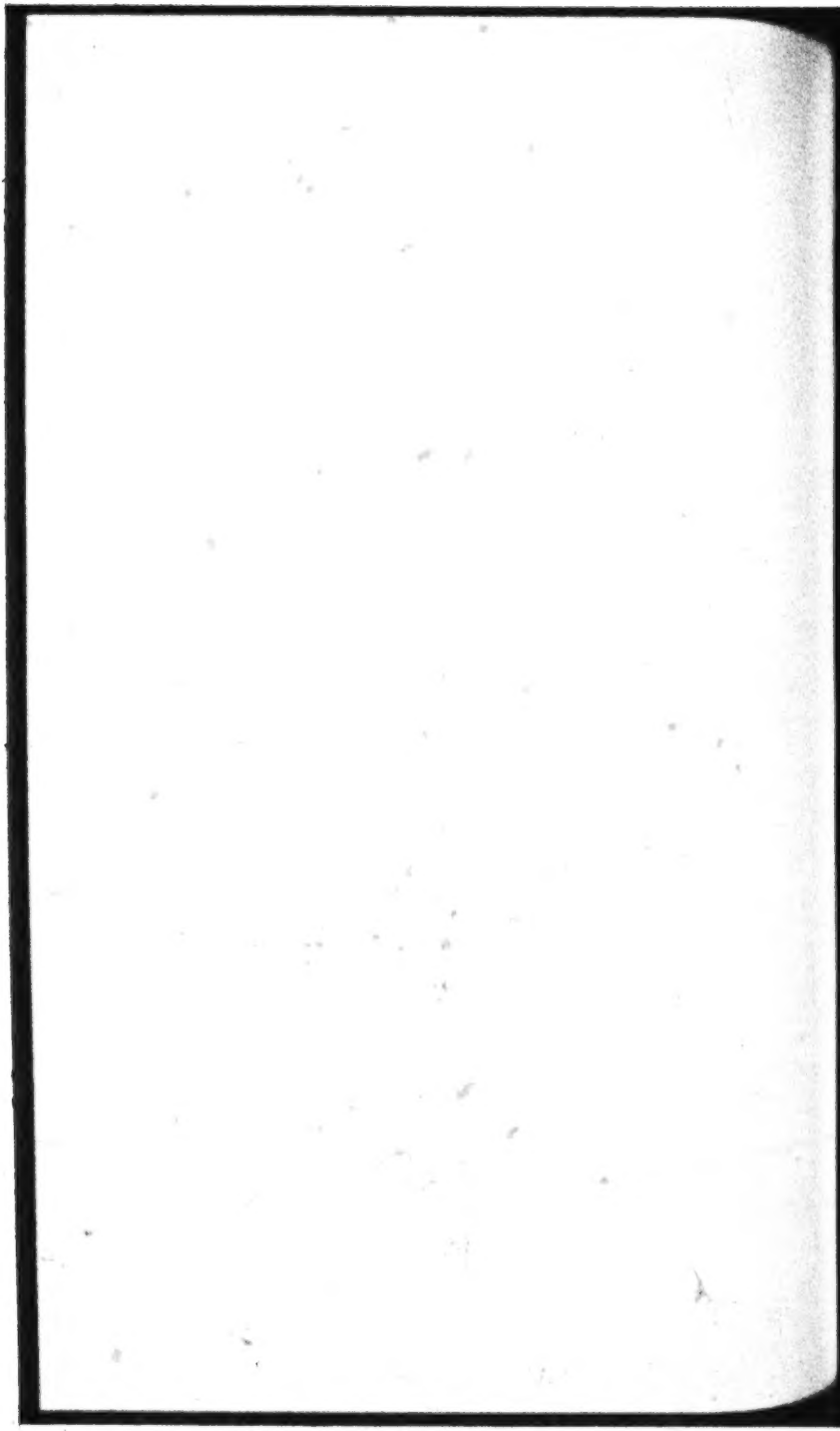

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

CARL JAY NATHANSON
Nassau County Law Services Committee, Inc.
285 Fulton Avenue
Hempstead, New York 11550

STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare Policy and Law Inc.
25 West 43rd Street
New York, New York 10036

Attorneys for Petitioners

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

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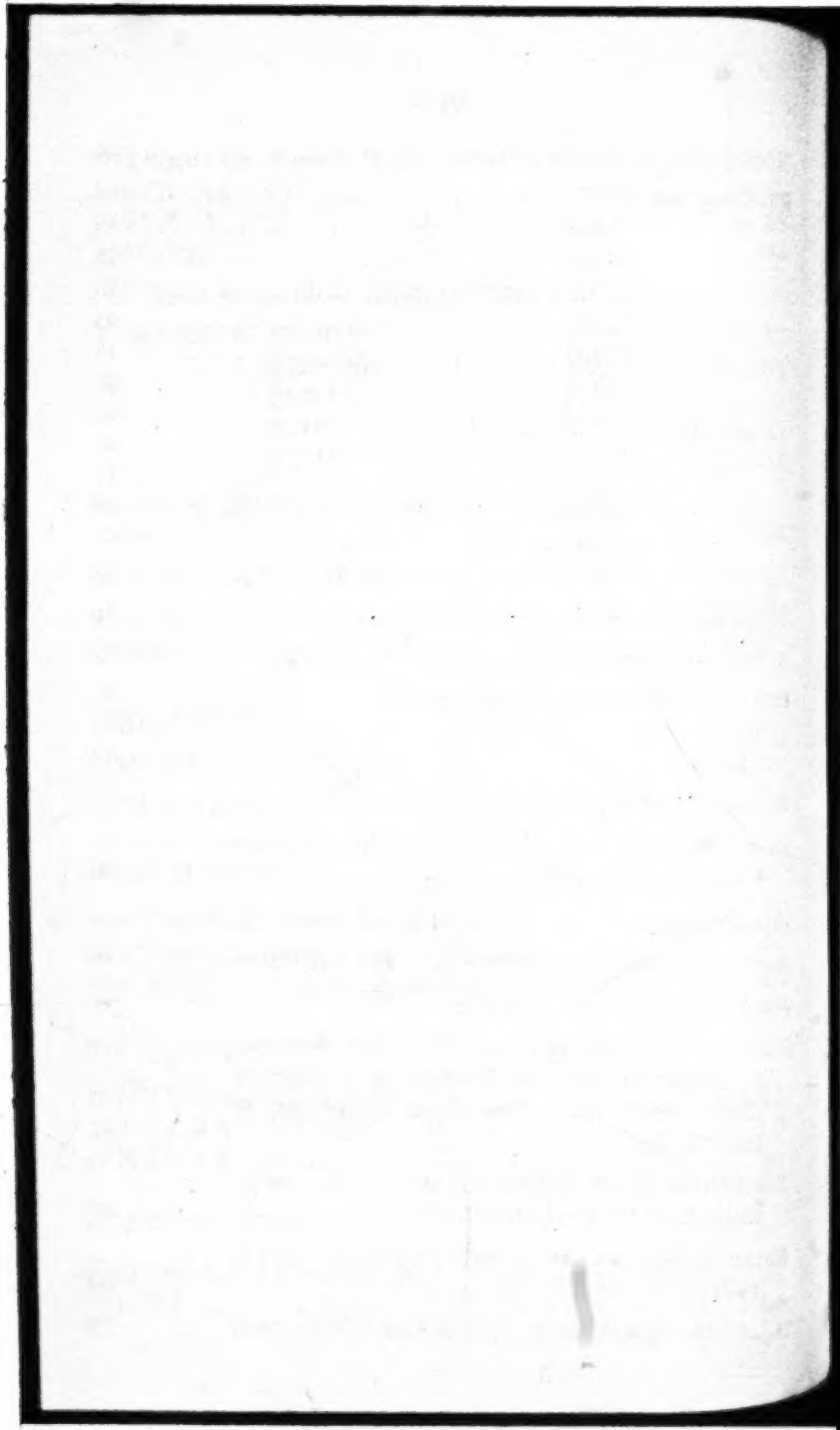

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BRIEF OF PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals [A-120-124] * is reported at 471 F.2d 347 (2d Cir. 1973).

*Numbers in parenthesis preceded by "A" refer to pages of the Appendix.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit, remanding the case to the District Court with instructions to dismiss for want of jurisdiction, was entered on January 8, 1973. The petition for a writ of certiorari was filed on March 31, 1973, and certiorari was granted on June 11, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

28 U.S.C. 1343(3) and (4) in pertinent part provides:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §602 in pertinent part provides:

"(a) A state plan for aid and services to needy families with children must:

* * * * *

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual [living in the same home as such child and relative] whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

* * * * *

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

RULES AND REGULATIONS

45 C.F.R. §233.20(a)(3)(ii)(c) in pertinent part provides:

"(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must

* * * * *

(3)(ii) provide that, in establishing financial eligibility and the amount of the assistance payment: * * *

(c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered, . . ."

18 New York Code of Rules and Regulations – §352.7(g)(7) in pertinent part, provides as follows:

"(g) *Payment for services and supplies already received.*

Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need.

(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one

rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit found that "because no substantial constitutional claim was presented, the district court was without jurisdiction to consider the statutory claim urged by plaintiffs". [A-124]. The questions presented to this Court, therefore, are:

1. Does the complaint challenging New York's welfare recoupment regulation [18 N.Y.C.R.R. §352.7(g)(7)] as violative of the equal protection and due process clauses of the Fourteenth Amendment present substantial constitutional claims sufficient to support federal court jurisdiction to determine the pendent statutory claim under 28 U.S.C. §1343(3)?

2. Did the district court have jurisdiction pursuant to 28 U.S.C. §§1343(3) and 1343(4) over the statutory claim founded on 42 U.S.C. §1983 and seeking to declare the New York regulation violative of the Social Security Act, even absent a substantial constitutional question?

STATEMENT OF THE CASE

In 1971, the New York State Department of Social Services promulgated Section 352.7(g)(7) of Title 18 of the New York Code of Rules and Regulations.[1] The

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[1] The regulation orginally numbered 18 N.Y.C.R.R. §352.7(g)(6) was renumbered 18 N.Y.C.R.R. §352.7(g)(7) effective December 10, 1971, states as follows:

regulation was submitted to HEW for approval as part of the New York State plan. In November 1971, and again on December 29, 1971, the Regional Commissioner apprised the State that the regulation does not conform to federal requirements. [A-67-68]. Although the regulation has never received HEW approval, New York has nevertheless, continued to give the regulation state-wide application, to all categories of assistance. In addition, the State claims and receives federal funds, notwithstanding its non-compliance with federal requirements.

Appellants and their dependent children are recipients of public assistance under New York's Aid to Dependent Children program [ADC], and receive monthly grants calculated to provide 90% of their familial sustenance needs.[2]

"(g) *Payment for services and supplies already received.*

Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

* * * * *

(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

[2]New York, as do all other states, participates in the federal program of Aid to Families with Dependent Children (AFDC) under the Social Security Act of 1935. Section 131-a of the New York Social Services Law, [McKinney Supp, 1972] provides for a schedule of payments to families with dependent children based on the number of individuals in the household. The statewide standard

Appellant CYNTHIA HAGANS, and her two infant children received a shelter allowance from the Nassau County Department of Social Security in the sum of $165.00, the maximum allowance for her size family under the social service district's rent schedule. Because of an acute housing shortage, appellant HAGANS was unable, and the State has so conceded, to obtain housing at the scheduled allowance. [A-34]. She rented an apartment in Massapequa, New York at a cost of $200.00 monthly. She was unable to make up this $35.00 difference with the limited funds allotted for the family's basic needs. As a result, she accumulated arrears and was unable to pay the December 1971 rent. She was evicted from her apartment in January 1972. The same month an emergency rent disbursal of $175.00 was made by the Nassau County Department of Social Services to rehouse the family. This payment was recovered in full during the subsequent month leaving appellant HAGANS and her two children with but $17.00 for an entire month's basic needs. [A-33-37]

Each appellant, for various reasons, was unable to pay her rent, and was threatened with eviction for non-payment.[3] To prevent eviction, emergency rent payments

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of need, is, that sum of money minimally required to sustain life, including food, clothing, utilities, furniture, household supplies, laundry and personal expenses. Each social service district establishes a maximum schedule of monthly shelter allowances which is added to the basic needs grant. In July, 1971, New York enacted a 10% ratable reduction in the level of benefits and now pays recipients 90% of the standard of need.

[3]The regulation mandates recoupment regardless of fault. While the district court noted that the named-plaintiffs were without fault in the management of the proceeds of their grants [A-73 n.5] the court also observed that "Recipients threatened with eviction are in default for a variety of reasons; at times it is mismanagement

were made by the local Department of Social Services, at times without even appellants' knowledge or consent. (A-33-37, 113]. These payments characterized as "advances" by the State, were deducted or "recouped" from appellants' subsequent familial grants of assistance pursuant to the mandate of the recoupment regulation.[4] During the period of recoupment, when the grant for basic needs was reduced, appellants had no other additional income or resources to meet the families' basic needs. [A-33-37].

The History of These Proceedings

On February 10, 1972, appellants commenced this action in the United States District Court for the Eastern District of New York, individually, on behalf of their infant children, and as representatives on behalf of recipients of New York's Aid to Dependent Children similarly situated. Appellants challenged the validity of the New York recoupment regulation on constitutional and statutory grounds and sought both injunctive and declaratory relief pursuant to 42 U.S.C. §1983 and 28

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of the funds allotted; at times it is for reasons beyond their control." [A114-115]. Moreover, evictions for non-payment of rent may really be the "fault" of the low welfare grants, which are 90% of needs in New York. Indeed, CYNTHIA HAGANS' difficulty arose because her shelter allowance was below her actual rent needs.

[4] Although the State argues that the recoupment regulation does nothing but provide a convenient method of recovering the "advance" allowance, such contention does not withstand scrutiny, inasmuch as the Social Security Act explicitly prohibits "advance" allowances in the form of accelerated payments or repayable loans. It deals only in terms of present need, as determined each month. [A-59, 115, 116].

U.S.C. §2201. The jurisdiction of the Court was invoked under 28 U.S.C. §1343(3) and (4). The constitutionality of the regulation was subjected to a two-fold challenge under the equal protection and due process clauses of the Fourteenth Amendment. Appellants contended that the regulation is violative of the equal protection clause because it arbitrarily and irrationally divides children receiving benefits under New York's Aid to Dependent Children [ADC] program into two classes, indistinguishable from one another in need or eligibility, and invidiously imposes deprivation on one of those classes [children whose parents have required and received emergency rent payments] by depriving them of the state-defined level of minimum subsistence for as much as 6 months.[5] [A-13, 14].

Appellants claimed that the regulation is violative of the due process clause of the Fourteenth Amendment because it is vague and without standards; and creates an irrebutable presumption of mismanagement contrary to fact. [A-14]. Appellants' statutory claim alleged that the recoupment regulation contravenes the Social Security Act §402(a)(7) and §402(a)(10), 42 U.S.C. §602(a)(7) and §602(a)(10) as well as the HEW regulations promulgated thereunder, 45 C.F.R. §233.20(a)(3)(ii)(c) because it assumes contrary to fact, that those funds extended to a

[5]The challenged regulation contains no standards governing implementation and thus permits full recoupment to take place in but a single month, [A-51] with devastating consequences upon the family's well-being, as was done in the case of CYNTHIA HAGANS [A-34]. By the terms of the regulation more than one recoupment can take place during the same period. In addition, more than one type of recoupment may be imposed at the same time since New York regulations also mandate recoupment of emergency utility payments furnished to prevent a shut-off or restore utility services. See 18 N.Y.C.R.R. . §352.7(g)(5).

recipient in one month to meet a current emergency rent need, remain available as income for the family's need during the six month recoupment period. [A-11-13].

The district court [Mishler, C.J.] found that the constitutional claim charging a violation of the equal protection clause of the Fourteenth Amendment was substantial and the basis for pendent jurisdiction to determine the statutorily-based claim under 42 U.S.C. §1343(3). [A-68]. At the trial, the State adduced the testimony of Arthur J. Doring, a consultant with the State Department of Social Services with respect to the policy and intent of the regulation.[6] After ruling the action properly maintainable as a class action, the court declared the recoupment regulation to be violative of the Social Security Act and HEW regulations and enjoined its implementation or enforcement. [A-75, 76]. The State appealed.

On appeal, the Court of Appeals for the Second Circuit unanimously found jurisdiction under 28 U.S.C. §1343(3). [A-81]. The majority court concluded, however, that the order of the district court should be vacated and the case remanded to the trial court to determine "whether recoupment of past advances from current grants is a 'reduction in grant' so as to bring into effect New York fair hearing procedures." [A-82].[7] On

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[6] Appellants withdrew their motion for the convening of a three judge court and the parties consented to an expedited trial on the merits before a single district court judge pursuant to Rule 65 (a)(2) of the Federal Rules of Civil Procedure.

[7] Judge Lumbard, dissenting, found no purpose to be served by the remand since the regulation mandates recoupment without exception where duplicate rent payment is made and fair hearings would serve no purpose. On the merits, Judge Lumbard found the recoupment regulation to be consistent with the Social Security Act. [A-83].

remand, the district court, with the consent of the parties, granted leave for additional parties to intervene and file a complaint. [A-112].[8] The court on July 19, 1972, invited the Department of Health, Education and Welfare to participate in the action as *amicus curiae.*[9] On October 19, 1972, the district court [Mishler, C.J.] again held the recoupment regulation invalid as violative of the Social Security Act and HEW regulations, and enjoined its enforcement and implementation. [A-112-117]. The State appealed.

On appeal, the Court of Appeals for the Second Circuit, without deciding the merits of the action and without offering any basis to distinguish its holding from that of the Second Circuit panel in *Hagans I,* [462 F.2d 928, 930] or of federal courts in the various circuits which have found substance to similar constitutional claims, held that the district court did not have jurisdiction to reach the pendent statutory claim because "no substantial constitutional claim was presented." The

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[8]By the time of the remand, the original named plaintiffs had received full reimbursement of the moneys wrongfully recouped, in accordance with the injunction granted by the district court, and therefore, neither required nor requested fair hearings. While only two intervenors, BARBARA SIEMILLER and ELIZABETH ELY had requested and received fair hearings, the district court concluded that inasmuch as "[t]he pertinent section mandates recoupment if it is established that duplicate payments have been made to avoid threatened eviction. . . if fair hearings were afforded (all) the members of the class, the determination would be the same as in SIEMILLER." [A-115].

[9]HEW, in its *amicus* brief, concluded that "the New York Regulation contravenes federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months". Brief for HEW as *amicus curiae* at 2A. A copy of the *amicus* brief may be found in Appendix A of this brief.

Court remanded the case to the district court with instructions to dismiss for want of jurisdiction. [A-120-124].

SUMMARY OF ARGUMENT

I

The district court concluded that the complaint pleaded a substantial constitutional claim and properly exercised pendent jurisdiction over the Social Security Act claim pursuant to 28 U.S.C. §1343(3). The guidelines for determining whether constitutional claims are of sufficient substance to support federal jurisdiction are well defined by the unbroken line of decisions of this Court. Unless claims are so attenuated as to be "absolutely devoid of merit", *Baker v. Carr*, 369 U.S. 186, 189, or previous decisions of the Court have rendered them "inescapably" frivolous, leaving no room for the inference that the questions sought to be raised can be the subject of controversy, they must be deemed *substantial* for the purpose of determining the threshold question of jurisdiction. *Goosby v. Osser*, 409 U.S. 512, 518.

We submit that application of the *Goosby* standard to the two-fold constitutional challenge presented here in the complaint, demonstrates that the claims are substantial, as was recognized by the district court, the court of appeals panel in *Hagans I*, and the district courts in other circuits which found substance to these claims and invoked federal jurisdiction to strike down similarly-styled regulations.

The challenged recoupment regulation [18 N.Y.C.R.R. §352.7(g)(7)] operates to create two classes of needy children receiving benefits under New York's Aid to Dependent Children [ADC] program and imposes deprivation on one of those two classes that lacks rational

relation to, and indeed frustrates attainment of, the paramount goal of the Social Security Act, namely, the protection of needy, dependent children. *King v. Smith,* 392 U.S. 309. In New York, any child in an ADC family whose parent receives an emergency rent payment to forestall an eviction is denied the state-determined level of sustenance for as long as six months to enable the state to recover the rent payment, while assistance commensurate with the state-determined needs is afforded to all other children. It is this distinction that appellants argue is "not rationally based and free from invidious discrimination," *Dandridge v. Williams,* 397 U.S. 471, and is violative of the equal protection strictures. The recoupment regulation punishes children, not because of any conduct of their own, but solely because of their parents' conduct. *Levy v. Louisiana,* 391 U.S. 68, 72. Treating needy children, otherwise similarly situated, differently because of their parents' conduct is not an example of "rationality" but of "arbitrary ... choice." *Reed v. Reed,* 404 U.S. 71, 76-77. Depriving children of the means to sustain themselves for as long as six months to further the state's proferred interest, teaching their parents proper money management, is *not in fact* rationally related to any legitimate state interest, particularly in light of the non-punitive rehabilitative measures which both Congress and New York have established to deal with the problem of mismanagement. *Cf. United States Dept. of Agriculture v. Moreno,* 93 S.Ct. 2821. The vague and standardless regulation is also challenged as violative of the due process clause because it deprives children of statutory entitlements on the basis of conclusive presumptions, contrary to fact, [i.e., that recipients who receive emergency rent payments have mismanaged their grants; that funds extended to a recipient in one month to meet an emergency rent need

remain available as a resource to meet his current needs during the period of recoupment] without due process of law. *Bell v. Burson*, 402 U.S. 535.

Appellants also challenged the regulation as being in conflict with the Social Security Act and HEW regulations which mandate that states "shall in determining needs, take into account any income or resources . . ." of the child or relative, Social Security Act 402(a)(7), 42 U.S.C. 602(a)(7), and in determining the amount of the grant shall consider "only such income as is actually available for current use on a regular basis. . . ." 45 C.F.R. §233.20(a)(3)(ii)(c). In the view of HEW, as expressed in its *amicus* brief, and in the view of the district court which permanently enjoined its enforcement, the recoupment regulation contravenes federal requirements.

The court below erroneously concluded that the constitutional claims were insubstantial on the basis of *Dandridge v. Williams, supra,* for as we have demonstrated the challenged classification fails even to satisfy the *Dandridge* standard—"rationally based and free from invidious discrimination." Moreover, reliance on *Dandridge* as determinative of the due process claim is even more unavailing since that decision is limited to equal protection analysis. Given its broadest application, *Dandridge* gave the court below reason to question or doubt appellants' ultimate success on the merits of the equal protection claim. But as this Court clearly noted in *Goosby,* such doubt may not serve as the basis for determining that constitutional claims are insubstantial.

II

The district court properly exercised jurisdiction over appellants' Social Security Act claims whether or not the complaint pleaded a substantial constitutional claim. 42 U.S.C. §1983 provides for a civil action to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution and laws of the United States. Appellants sought to redress rights secured to them by one such federal "law," the Social Security Act, namely, the right to receive AFDC benefits to which they are entitled and computed without any assumptions as to the availability of income and resources which they do not have, a right secured by §§402(a)(7) and (10) of the Act, 42 U.S.C. §§602(a)(7), (10).

28 U.S.C. §1343(4) provides for jurisdiction over claims brought under "any Act of Congress providing for the protection of civil rights." Section 1983 is such an Act. It protects civil rights by providing civil remedies [equitable and damages] for their deprivation by state officials, and by providing a federal forum to enforce those rights which may be utilized without regard to the availability of parallel state remedies. Among the "civil rights" protected by §1983 is the right to acquire and possess property. The right to possess government benefits according to the terms set forth by Congress is surely such a right.

This Court has recently recognized that §1983 is an act which protects civil rights within the meaning of §1343(4). The Court distinguished §1983 from §1988 which does not protect civil rights by itself, but only in cooperation with §1983 and other statutes which do protect civil rights. *Moor v. County of Alameda*, ___ U.S. ___, 93 S.Ct. 1785, 1792 (1973). The second circuit has

rejected this interpretation solely on the basis of the personal liberty/property rights distinction now rejected by this Court.

The only doubt as to the applicability of §1343(4) to suits such as this is a reference in the House Report referring to §1343(4) as a "technical amendment" to conform to "amendments made to existing law by the preceeding section of the bill." The "preceeding section" was *not* enacted, however, and this explanation thus provides the Court no guidance. In any case, the plain language of the section goes so far beyond the purported function ascribed to it by the Committee, even had the preceeding section been passed, as to require the Court to give the words their natural meaning, particularly in light of certain legislative history indicating that the section was, indeed, intended to *expand* federal jurisdiction. In fact, §1343(4) was specifically retained on the floor of the Senate after its elimination had been proposed along with other parts of the Bill, in an exchange for liberal support for another proposed amendment. Finally, this Court has read §1343(4) as expansive of federal jurisdiction by relying on it to afford jurisdiction in a private §1982 housing discrimination case, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a case in which no other basis for jurisdiction was available.

28 U.S.C. §1343(3) also provided jurisdiction. While §1983 establishes a remedy for violations of any federal law by state officials, §1343(3) provides for jurisdiction where the right asserted is under any Act of Congress "providing for equal rights." Section 1983 is such an Act.

The predecessor to §1983, §1 of the 1871 Civil Rights Act, provided for concurrent jurisdiction in the district and circuit courts for *all* §1983 cases. In 1874, the Revised Statutes placed the substantive provision of §1

in R.S. §1979 (now §1983) and the jurisdictional provisions in R.S. §563(12) (district court) and R.S. §629(16) (circuit court). The district court provision specifically authorized jurisdiction for claims to redress deprivations of "any right secured by *any* law of the United States," but the circuit court provision contained the "equal rights" language now found in §1343(3). There was no explanation for the different language used, nor any indication that the circuit courts were to exercise a more limited jurisdiction.

When the revisers of the Judicial Code abolished the circuit court's original jurisdiction in 1911, the "equal rights" language was used for the district court's jurisdictional grant. The revisers gave no indication of an intent to retract the district court's power in civil rights cases, and the Senate Committee noted only that it had "merged" the jurisdiction of the two courts.

The apparent anomaly of a federal remedy having been created without federal court jurisdiction does not really exist since §1983 is itself an "equal rights" statute within the meaning of §1343(3). This Court has noted that the momentum behind §1983 was "not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand." Section 1983, by providing a federal remedy and federal forum, secured, for those unable to obtain it from the state courts, equal treatment before the law.

The Court should find jurisdiction under §1343 to preserve the primary, if not exclusive, historical purpose of the section, i.e., to provide a federal *judicial* remedy for state inspired transgressions of federally created or guaranteed rights. *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972); *Monroe v. Pape*, 361 U.S. 167. A federal forum is particularly critical where complex federal

statutes are involved, federal funds are expended thereunder, and uniform and sympathetic interpretation essential to the statute's successful administration. An adverse interpretation may leave recipients in some states without a remedy when filing fees are imposed in their state courts, or where state courts do not have sufficient equitable jurisdiction to provide an adequate remedy.

ARGUMENT

POINT I

APPELLANTS' COMPLAINT PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS ESTABLISHING FEDERAL COURT JURISDICTION

A. The Procedural Posture

The courts below differed as to whether the constitutional claims presented were substantial.[10] The court of appeals concluded that the "district court was without jurisdiction to determine the statutory claim urged by plaintiffs" because the case presented no substantial constitutional claim.[11] The procedural posture of this case delineates the issue in this Court.

The question here is not the ultimate disposition of the constitutional or statutory claims raised by the complaint, but rather the threshold question, whether these claims are of sufficient substance to support federal jurisdiction.

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[10]Both the district court [A66-68] and the court of appeals in *Hagans I* [462 F.2d 928, 930] [A-81] found the constitutional claims presented of sufficient substance to support federal jurisdiction.

[11]The accuracy of calling such dismissals jurisdictional has been questioned by the court on several occasions. *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

Appellants presented three basic claims in their complaint. They challenged: (1) the recoupment regulation is violative of the equal protection clause of the Fourteenth Amendment because the regulation creates two classes of needy children receiving benefits under New York's Aid to Dependent Children program. Children whose parents received an emergency rent disbursement in a prior month to prevent eviction and loss of housing, which payment has been expended and is no longer available to meet their current needs, are denied the state-determined level of assistance for as long as six months. All other needy children are afforded full assistance commensurate with the state-determined level of assistance. It is this distinction which appellants submit is not "rationally based and free from invidious discrimination", *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), and therefore, denies the equal protection of the laws; (2) the recoupment regulation is violative of the due process clause of the Fourteenth Amendment because it deprives appellants of statutory entitlements without their being afforded due process of law. The regulation creates irrebutable presumptions contrary to fact, i.e., that all recipients who receive emergency rent payments have mismanaged their shelter allowances; that these emergency rent payments remain available as a resource to meet current needs during the period of recoupment. By not permitting recipients to rebut these presumptions, the State has denied them due process of law, *Bell v. Burson*, 402 U.S. 535 (1971); *Heiner v. Donnam*, 285 U.S. 312 (1932); [12]

[12]The due process claim was manifold. In addition, the regulation was challenged as "vague and standardless" since welfare officials are left at large to speculate as to the meaning and application of the recoupment regulation. The regulation, therefore, transgresses the bounds of fundamental fairness. *Cf. Giaccio v. Pennsylvania* 382 U.S. 399 (1966).

and (3) the regulation is violative of the Social Security Act and HEW regulations because it assumes, contrary to fact, that funds extended to a recipient to meet a current emergency rent need remain available as income for the family's needs during the subsequent period of recoupment. *See Lewis v. Martin*, 397 U.S. 552, 559 (1970).

The district court found the equal protection claim substantial and the basis for jurisdiction pursuant to 28 U.S.C. §1343(3) over the cause of action authorized by 42 U.S.C. §1983 and accepted pendent jurisdiction over the statutory claim. *See Rosado v. Wyman*, 397 U.S. 397 (1970).

The court below cited no controlling authority to support its conclusion that the constitutional questions were insubstantial. Moreover, the opinion is limited to a brief analysis of the equal protection claim, and thus it is not clear whether the court *sub silentio* has declared the due process claim to be insubstantial as well.

Appellants contend that the court below erred in concluding the constitutional claims to be insubstantial, and that application of the standards expressed by this Court for determining whether substantial questions are presented, require a reversal here. We show in this brief that the complaint raises substantial non-frivolous constitutional questions and that the district court had jurisdiction under 28 U.S.C. §1343(3). Appellants will demonstrate that even if the Court below correctly concluded that the complaint fails to raise substantial constitutional questions, the district court had jurisdiction to determine the statutorily-based claim under 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983.

Despite differences in language between §1343(3) and §1983, the legislative history indicates that the scope of the two sections was intended to be co-extensive. Thus, §1343(3) provides jurisdiction for all causes of action

under §1983. Furthermore, jurisdiction over the Social Security Act claim exists under §1343(4) since §1983 is an act "providing for the protection of civil rights".

B. Standards of Review: *Goosby v. Osser*, 409 U.S. 512

Article III, §2 of the federal constitution provides that "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . ." Congress has exercised its power to assign jurisdiction to the district courts in 28 U.S.C. §1343(3):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [to] redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ."

42 U.S.C. §1983 creates a cause of action to challenge the conduct of persons who, under color of state law, deprive the claimant of "any rights, privileges, or immunities secured by the Constitution and laws, ..."

Simply stated, "[J]urisdiction is authority to decide the case either way." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). In determining the threshold question of jurisdiction, the court's inquiry is restricted to "whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the . . . court jurisdiction. . . ." *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902). In determining this jurisdictional question, a court must look to the complaint to ascertain whether it sets forth a claim arising

under the Constitution and laws of the United States so as to satisfy the requirements of 28 U.S.C. §1343. It is clear from a reading of the complaint that the appellants' claims arise under the Constitution and laws of the United States. The complaint alleges that the New York regulation deprives the appellants of due process and the equal protection of the laws in violation of the Fourteenth Amendment and violates the provisions of the Social Security Act.

Jurisdiction is not defeated by the possibility that the pleadings fail to state a cause of action on which the appellants could actually recover. "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action upon which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood,* 327 U.S. 678, 682 (1946).

This Court in *Baker v. Carr,* 369 U.S. 186, 199 (1962), stated: "[d]ismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit', ..." [citation omitted].

The decisions of this Court establish that dismissal for want of jurisdiction is appropriate only where the alleged claim under the Constitution or federal statute is patently without merit and "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous." *Bell v. Hood, supra,* 327 U.S. at 682-83.

Recently in *Goosby v. Osser,* 409 U.S. 512, 518 (1973), the Court articulated the standard to be applied

by the courts in determining whether constitutional claims are substantial.

The lower court had erroneously determined that the constitutional claim had been rendered insubstantial by an earlier decision. This Court considered such limiting words as "wholly without merit" and "obviously without merit" in the context of determining the effect of prior decisions upon the substantiality of constitutional claims and finding them to have particular significance, stated:

> "... those words import that claims are constitutionally insubstantial only if prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial. ..."

Given this standard, we maintain that in view of the pertinent case law, the stipulated facts, and the allegations of appellants' complaint which must be accepted as true, *Boddie v. Connecticut*, 401 U.S. 371, 373 (1971), the court below erred in dismissing the complaint for lack of jurisdiction. The finding of jurisdiction by the Court of Appeals in *Hagans I*, and the decisions of district courts in several circuits which have found these constitutional claims to be non-frivolous and of substance, strongly support our contention that the court below erroneously determined the threshold question of jurisdiction.

C. Substantial Constitutional Questions Are Presented

The court below erroneously concluded that the decision in *Dandridge v. Williams, supra*, 397 U.S. 471, rendered the constitutional claims insubstantial. The holding of this Court in *Dandridge*, which involved the validity of maximum grant provisions, is not dispositive

of the claims presented by appellants' complaint.[13] In *Dandridge*, the Court determined that equal protection challenges to welfare legislation are to be tested by the minimum rationale standard of review. The consideration of the facts and circumstances behind the law, as well as the balancing of state interests protected and the interests of those disadvantaged, [not substantiated by evidence in the record] by the court below is, in fact, a recognition that a "non-frivolous" and "substantial" claim was presented. Such analysis should properly be confined to determining the merit of the claim, after the finding of jurisdiction. *Cf. Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Application of the standard articulated in *Dandridge v. Williams, supra* at 487—that the statute be "rationally based and free from invidious discrimination", requires a finding that the constitutional claims are substantial.

1. *The denial of the State-determined level of assistance to needy children receiving benefits under the Aid to Dependent Children Program is not rationally based and constitutes invidious discrimination.*

The New York recoupment regulation operates to create two classes of needy children receiving benefits under the State's Aid to Dependent Children program. Children whose parents receive an emergency rent payment to forestall an eviction or secure housing, are denied the state-determined level of assistance for as long as six

[13]The court of appeals' disposal of the due process claim on the basis of *Dandridge* is even more unavailing for that decision rested by its own language squarely on equal protection and not due process. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970); *Boddie v. Connecticut, supra.*

months during the period of recoupment. All other needy children under the ADC program receive full assistance commensurate with the state-determined level of benefits. The recoupment regulation thus creates classifications of children on the basis of their parents' conduct, over which they have no control, "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175 (1972). We submit that this classification is not "rationally based and free from invidious discrimination," *Dandridge v. Williams, supra* at 487 and therefore, denies the equal protection of the laws.

2. *The classification is not "rationally based"*

At the threshold, the equal protection Clause "imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966). The challenged classification does not satisfy this standard.

Appellants' children were not deprived of the state-determined level of sustenance because they were less eligible or needy than their peers receiving benefits under the ADC program. Indeed, so far as the record discloses, each is indistinguishable from his peers. The deprivation of the means of minimum sustenance for as long as six months because of their parents' conduct is an example, not of "rationality", but instead an "arbitrary ... choice" by which the State provides "dissimilar treatment for [children]who are ... similarly situated...." *Reed v. Reed*, 404 U.S. 71, 76-77 (1971). The classification of children on the basis of parental conduct is "arbitrary and irrational...." *Lindsey v. Normet*, 405 U.S. 56, 79 (1972).

a) The regulation violates the mandated goals of the Social Security Act

The rationality of the classification must be assessed in light of the purposes of the Social Security Act. In making funds available to the states for public assistance purposes, the Congress meant to attain these purposes, and states, in administering public assistance, must observe these policies. *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971).

While the State no doubt has a valid interest in deterring mismanagement, "the means chosen to accomplish this interest conflict with a primary purpose of the [Social Security] Act and effectively punish the needy child for parental mismanagement. If the purpose of the AFDC program were to train needy individuals in the proper techniques of money management, the New York advance or duplicate assistance policy might not present a problem. However, that is not a primary purpose of the Act." [Brief for HEW as *amicus curia*, at 11.] Elaborate argument is unnecessary to establish that the recoupment regulation and the deprivation it imposes upon needy children bear no rational relation to the mandated and "paramount goal of AFDC", providing basic financial protection to needy, dependent children. *King v. Smith*, *supra* at 325. Similarly styled state recoupment regulations have been declared by federal courts not to be rationally related to the mandated goals of the child-oriented AFDC program. *See, Cooper v. Laupheimer*, 316 F. Supp. 264, 269 [E.D. Pa. 1970]; *accord Bradford v. Juras*, 331 F. Supp. 167 [D. Ore. 1971].[14]

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[14] In *Holloway v. Parham*, 340 F. Supp. 336 [N.D.Ga. 1972] the court found the equal protection challenge to a recoupment regulation to be substantial and the basis for jurisdiction. The

b) The recoupment regulation is destructive of overriding State objectives

The classification cannot be justified as "rationally based" on the ground that depriving needy children of the means to survive for as long as six months "encourages proper money management". The court below found this to be an entirely acceptable purpose. However, this approach entirely misconceives the issue by fastening upon but one element in a complex system of public welfare. One might even concede [we do not] that the regulation, in fact, advanced that limited purpose. Starving children to encourage proper money management by their parents is destructive of other, and appellants submit, overriding state objectives. New York's Constitution mandates that "[t]he aid, care and support of the needy are public concerns . . . ." N.Y. Const., art. XVII, §1. The Legislature has expressed its concern that allowances "shall be adequate to enable the father, mother or other relative to bring up the child or minor properly, having regard for the physical, mental or moral well-being of such child . . . ." N.Y. Social Services Law §350(1)(a). [McKinney Supp. 1972]. "The interest of the child has been ever paramount." *Crowley v. Bressler*, 181 Misc. 59, 63 [Sup. Ct. 1943]. Manifestly, the deprivation visited upon the child, solely because of his parents' conduct, is contrary to the concern for the aid

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regulation challenged therein was declared consistent with the Social Security Act because, unlike New York's regulation, it required that Georgia consider the need of dependent children and waive repayment where it would deprive needy children of subsistence. The court delcared that the regulation did not permit current assistance to be reduced to recover prior overpayments unless the recipient had income or resources in the amount of the proposed reduction.

and care of needy, dependent children, which is the overriding purpose of the state program of ADC. By punishing the target and primary beneficiary of the ADC program, "the state spites its own articulated goals. . . ." *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

c) The classification is not free from invidious discrimination

It is equally evident that the classification is invidiously discriminatory. The Fourteenth Amendment rights of children are burdened because of their parents' conduct. But "it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm [thus done to them] . . . ." *Levy v. Louisiana*, 391 U.S. 68, 72 (1972).

The State places principal reliance on its argument that "it is plainly reasonable to require repayment of monies advanced as a means of encouraging welfare recipients to learn proper money management and to deter recipients from misallocating funds." [Respondent's Brief in opposition to certiorari at 10.] The flaw in this argument is manifest by the fact that the regulation is not limited to mismanagement, but mandates recoupment regardless of fault whenever the emergency rent disbursement is made.[15] In addition, the State is in the anomalous

[15]Both the district court and the court of appeals in *Hagans I* accurately noted that duplicate rent payments result not only from fault or mismanagement, but that "[r]ecipients threatened with eviction are in default for a variety of reasons; at times it is mismanagement of the funds allotted, at times it is for circumstances beyond their control." [A-115]. Moreover, at the trial, Arthur Doring, a consultant with the New York State Department of Social Services conceded that persons [such as CYNTHIA HAGANS] whose actual rent exceeded the allowance and who required duplicate payments, were not to be charged with mismanagement, but would, nevertheless, fall within the terms of the recoupment regulations. [A-53].

position of contending that the regulation was promulgated to deter mismanagement of shelter allowances and prevent costly motel placements, [A-40-41] while acknowledging that recipients who have mismanaged their grants and require motel placement are exempt from the operation of the regulation. [A-63].

The arbitrariness of the classification would alone be sufficient to establish that the State has "impose[d] a regime of invidious discrimination. . . ." *Dandridge v. Williams, supra* at 483. Appellants note also that there are alternatives available to deal with the proferred interest which are non-destructive of the larger state purpose. Consideration of these alternatives is proper. *Carrington v. Rash,* 380 U.S. 89 (1965); *Lindsey v. Normet,* 405 U.S. 56 (1972).

Congress recognized that mismanagement of grants was a problem and established several non-punitive measures to deal with the problem, [none of which includes recoupment] in ways that further, rather than frustrate, the purpose of the AFDC program. The existence of these rehabilitative measures to deal with the problem of mismanagement necessarily casts considerable doubt that this regulation could be rationally intended to prevent the same abuses.[16] *United States Dept. of Agriculture v. Moreno,* 93 S.Ct. 2821, 2827 (1973). The State has argued that the recoupment regulation is the only means

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[16]The Social Security Act requires that state plans make provision in appropriate cases for providing aid to dependent children in the form of "protective payments" or "vendor payments" *See* Social Security Act §402(a)(15)(B)(ii); 42 U.S.C. §602(a)(15)(B)(ii); Social Security Act 406 (b)(2); 42 U.S.C. §606(b); 45 C.F.R. 234.60. New York has established three ways to deal with the problem of mismanagement [counselling, protective payments, family court proceedings]. *See* 18 N.Y.C.R.R. §381.

available to preserve needed housing. [A-63]. The State has deliberately disregarded the availability of emergency assistance to avoid destitution.[17] "Emergency assistance is designed to take care of the same sort of situation which §352.7(g)(7) covers, such as recipient's loss of housing." [Brief for HEW as *amicus curiae* at 14A.]

D. No Prior Decisions of the Court "Inescapably Render the Claims Frivolous"

A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of [the Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933). Recent decisions of the Court, and indeed, of other panels in the second circuit as well, clearly establish that appellants' constitutional claims are not insubstantial.

In *Eisenstadt v. Baird, supra; Reed v. Reed, supra; James v. Strange*, 407 U.S. 128 (1972); and *United States Dept. of Agriculture v. Moreno, supra*, this Court scrutinized the challenged legislative classification to determine whether it was, *in fact*, substantially related to the objective of the statute. Focusing on the legislative means under attack, the Court, applying the rational means standard to test the equal protection challenge, measured the classification by applying the laws to

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[17]New York Courts have consistently held that the provisions of N.Y. Social Services Law §350-j mandate emergency assistance to avoid destitution or to provide living arrangements for needy families with children. *See, Young v. Shuart*, 67 Misc. 2d 689 (Sup. Ct. 1971), *aff'd*. 39 A.D. 2d 724 (2d Dept. 1971). More importantly, the Social Security Act favors such assistance because it meets emergency needs without penalizing the child by reducing grants of assistance in subsequent months. *See*, Social Security Act §406(e), 42 U.S.C. §606(e), 45 C.F.R. §233.20.

factual context rather than accepting one hypothetical legislative justification to the exclusion of others that represented the true rationale of the classification. In *Reed v. Reed, supra* and *Eisenstadt v. Baird, supra*, the challenged statutes were held to be violative of the equal protection clause notwithstanding that the classifications had "minimal rationality" and "marginal relation" to a legitimate state interest.

In *Carter v. Stanton*, 405 U.S. 669 (1972), an Indiana welfare regulation was challenged as violative of the equal protection clause and Social Security Act. Because the lower court had dismissed the complaint on the grounds that the equal protection claim was insubstantial the question before the Court was similar to the case at hand. The Court, citing *Dandridge*, found the constitutional claim to be substantial, reversed the lower court's holding, and remanded the case for further proceedings.[18]

The principles of equal protection are "proteus-like" and "[i]n this day and time of dynamic expansion of constitutional principles and their application to new and sometimes unheard of situations it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial."[19] *Jackson v. Choate*, 404 F.2d 910, 913 (5th Cir. 1968). It is by far the better course—certainly from the standpoint of judicial

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[18]In *Townsend v. Swank*, 404 U.S. 282 (1971) decided subsequent to *Dandridge*, the Court while declaring the Illinois welfare statute invalid on the statutory grounds in *dictum*, stated: "We think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause."

[19]*See generally*, Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: Model for a New Equal Protection*, 86 Harv. L. Rev. 1 (1972).

economy—as *Goosby* holds, to forego the doubts, obtain jurisdiction and dispose of the issues on the merits. The court below, seemingly disposed of the merits of the claims under the guise of determining the threshold question of jurisdiction.

The Second Circuit panel in *Boraas v. Belle Terre*, 476 F.2d 806, 814-15 (2d Cir. 1973), rejected the use of rigid "litmus-paper test" analysis to equal protection challenges.[20] That case decided by the circuit subsequent to the case now before the Court, declared a zoning ordinance to be violative of the equal protection clause, after determining that it was not in fact substantially related to the objectives asserted by the legislative body.

Measured by the standards enunciated by this Court in *Goosby v. Osser, supra*, it is clear that there are no prior decisions of the Court which "inescapably" render the claims frivolous and without merit.[21] The court below erroneously concluded on the basis of the holding in *Dandridge v. Williams, supra*, that the claims were

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[20] Other panels in the Second Circuit have also voiced doubt over rigid two-tiered approach to equal protection claims. *See, e.g., City of New York v. Richardson*, 473 F.2d 923, (2d Cir. 1973), where the court applied what it described as "a modified rational relationship" standard. *Cf. Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1970)

[21] The second circuit has been troubled by the selection and application of the appropriate standards in determining whether constitutional claims are substantial. *See, e.g. Boraas v. Belle Terre*, 476 F.2d 824, 826 (2d Cir. 1973) (dissenting opinion, Timbers, denial *en banc review*); *Johnson v. New York State Education Dept.*, 449 F.2d 871, (2d Cir. 1971) *vacated and remanded*, 409 U.S. 75 (1972); *compare, Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971) *with Francis v. Davidson*, 340 F. Supp. 351, (D.Md. 1972), *aff'd*. 93 S. Ct. (1973); *Compare McCall v. Shapiro*, 292 F. Supp. 268 (D. Conn. 1969) *with Goldberg v. Kelly*, 297 U.S. 254 (1970).

insubstantial, for as we have demonstrated, here the classification fails to satisfy the standard of that case—"rationally based and free from invidious discrimination." Moreover, the court's reliance upon *Dandridge* as determinative of the due process claim presented by the complaint is even more unavailing, since that case is limited in scope to equal protection claims. While *Dandridge* might have afforded the court below reason to doubt the ultimate success of the equal protection claim, *Goosby* makes it abundantly clear that such doubt may not serve as the basis for determining that the claims are insubstantial.

As we have demonstrated the constitutional claims presented satisfy the *Goosby v. Osser* standard and are plainly substantial and sufficient to support federal jurisdiction. The conclusion by the court below to the contrary, is in conflict with the second circuit panel in *Hagans I*, and the courts in *Cooper v. Laupheimer, supra*, 316 F. Supp. 264; *Bradford v. Juras, supra*, 331 F. Supp. 167; *Holloway v. Parham, supra*, 340 F. Supp. 264, which found the constitutional claims herein presented to be of substance and the basis for invoking jurisdiction.

The district court having thus obtained jurisdiction under 28 U.S.C. §1343(3) by reason of the presentation of substantial constitutional claims, properly accepted the pendent jurisdiction over the statutory claim. *King v. Smith, supra.* This Court has held that the exercise of pendent jurisdiction is particularly appropriate, inasmuch as the claim based on a violation of the Social Security Act raises questions which primarily involve federal policy and law. *Rosado v. Wyman, supra*, 397 U.S. at 404 (1970).

POINT II

THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. §§1343(3) AND (4) TO DETERMINE THE FEDERAL STATUTORY CLAIMS

Whether or not the Court below properly concluded that the complaint fails to raise a substantial constitutional (equal protection or due process) claim sufficient to maintain jurisdiction under 28 U.S.C. §1343(3), and pendent jurisdiction over the Social Security Act claims, the District Court nevertheless had independent jurisdiction to determine those latter claims under both 28 U.S.C. §§1343(3) and 1343(4). Appellants will demonstrate that their federal statutory claims were properly founded under the Civil Rights Act, 42 U.S.C. §1983, and that Congress intended that all §1983 claims may be brought in a federal district court without regard to amount in controversy under 28 U.S.C. §1343.

First, Appellants will argue that §1983 is an "Act of Congress providing for the protection of civil rights, including the right to vote" within the meaning of §1343(4). Second, that §1983 is an "Act of Congress providing for equal rights of citizens or of all persons with the jurisdiction of the United States" within the meaning of §1343(3). Under either section, therefore, the district court had jurisdiction over the instant case.[22]

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[22]The district court agreed with the contentions advanced by appellants and HEW and held that the recoupment regulation contravened the Social Security Act §§402(a)(7) and (10) as well as HEW regulation, 45 C.F.R. §233.20 (a)(3)(ii)(c) because the regulation assumes, without proof, that the emergency rent disbursement, expended in a prior month, remains available to meet needs during the subsequent period of recoupment. HEW's regulation has been upheld in *Lewis v. Martin*, 397 U.S. 552, 559 (1970), and the District Court's holding on the merits is consistent

A. Deprivations of Rights Established by Federal Statutes May Be Redressed Under §1983

Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added)

This court has traced the history and expansion of this statute, which is §1979 of the *Revised Statutes* and which was originally §1 of the Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13, in several recent cases. *See, e.g., Mitchum v. Foster,* 407 U.S. 225 (1972); *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972). Although the predecessor of §1983 was originally restricted by its language to the redress of "rights, privileges, or immunities secured by the Constitution," it was expanded by the Congress when the federal statutes were revised and codified in 1875, and it now includes within its terms rights, privileges, or immunities "secured by the Constitution and *laws.*" (emphasis added). *See Mitchum v. Foster, supra* at 240 n.30; *Lynch v. Household Finance Corp., supra* at 543 n.7, 548 n.15, 549, n.16; *Adickes v. S.H. Kress & Co.,*

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with the decisions of other federal courts which have struck down similarly styled recoupment regulations. *See, e.g., Cooper v. Laupheimer,* 316 F. Supp. 264 [E.D. Pa. 1970]; *Bradford v. Juras,* 331 F. Supp. 167 [D. Ore. 1971]; cf. *Holloway v. Parham,* 340 F. Supp. 336 [N.D. Ga. 1972].

398 U.S. 144, 150 n.5 (1970);[23] *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966); *See also Bomar v. Keyes*, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947). *Cf. United States v. Price*, 383 U.S. 787, 797 (1966); *United States v. Guest*, 383 U.S. 745, 753 (1966).[24]

Appellants seek to redress in this lawsuit rights secured to them by federal "law", namely particular provisions of the Social Security Act and regulations promulgated thereunder. While they may not have any "right" in some absolute sense to a particular level of welfare benefits, or to any benefits at all, the Social Security Act has given them the right to receive AFDC benefits for which Congress has made them eligible, and computed according to the terms set forth by Congress, so long as the state continues to use federal funds for its AFDC

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[23]Congress continues to recognize the availability of §1983 to redress statutory deprivations. In *Adickes* the Court noted that §207(b) of Title II of the 1964 Civil Rights Act, 78 Stat. 243, 42 U.S.C. §2000a *et seq* provides that injunctive relief is the only available remedy for violation of that Title, and that this section was specifically inserted to prevent the use of §1983 to obtain damages for violations of the statute. *Id. See* 110 Cong. Rec. 9767.

[24]The *Revised Statutes* are positive law and repeal and supercede all previous Statutes at Large. See Revision of Statutes Act of 1874, ch. 333, §21, 18 Stat. 113 (1875). Thus, the authoritative language is that of R.S. §1979, not that of the original 1871 enactment which did not specifically mention "laws". It is certainly arguable, moreover, that since one of the rights, privileges and immunities, secured by the Constitution is the right found in §1 of the Fourteenth Amendment which protects citizens against state abridgment of their privileges and immunities, the original 1871 Act already afforded a remedy against state deprivation of federal statutory rights. This is so since such rights were amongst the privileges and immunities guaranteed by the Fourteenth Amendment. *See* the *Slaughter House Cases*, 16 Wall. 36 (1872).

program. *See, e.g., King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Townsend v. Swank*, 404 U.S. 282 (1971). Indeed, in the AFDC cases just cited, the Court adjudicated various Social Security Act claims which were specifically brought pursuant to §1983.[25]

B. 28 U.S.C. §1343(4) Provides Federal Jurisdiction for §1983 Claims

Section 1343(4) provides that the district courts shall have jurisdiction of any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." As this Court has often observed, the judicial construction of a statute properly begins "by looking to the text itself." *United States v. Bass*, 404 U.S. 336, 339 (1971). The text of §1343(4) leaves no room for dispute as to the district court's jurisdiction in this case, for the Social Security Act claims were brought under perhaps the most important of all the Acts which "protect" civil rights, §1983.

Initially, it is useful to remember that the term "civil rights" has *not* been used by Congress to refer narrowly only to the right to racial equality before the law. Thus, for example, §1983 applies to the whole gamut of federally protected rights. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 180-83 (1961); *Baker v. Carr*, 369 U.S. 186, 200, and n.19 (1962); *Douglas v. City of Jeanette*, 319 U.S. 157, 161-2 (1943). This Court has too frequently

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[25] Jurisdiction to decide the statutory claims in these cases was obtained because they were pendent to substantial constitutional claims. The statutory cause of action in each case, however, was alleged as arising under §1983.

reviewed the original "civil rights" statutes and described their fundamental purposes to require extended discussion here. Suffice to say that the initial Civil Rights Act, Act of April 9, 1866, ch. 31, 14 Stat. 27, "guaranteed 'broad and sweeping . . . protection' to basic civil rights", *Lynch v. Household Finance Corp., supra,* 405 U.S. at 543-44, and that those "civil rights" included the "[a]cquisition, enjoyment, and alienation of property." *Id.* The 1871 Civil Rights Act, the predecessor of §1983, was modeled after §2 of the 1866 Act, *Id.* at 543, and it protected citizens from the deprivation of such civil rights at the hand of state officials.

While there is considerable support in the legislative history of these Acts for the view that the civil rights to be protected by the Congress included a broad range of "fundamental rights" possessed by all citizens [as articulated by Justice Washington in his famous opinion interpreting the privileges and immunities clause of Art. IV in *Corfield v. Coryell*, 6 F. Cas. 546 [No. 3230] *see* Antieau, *Modern Constitutional Law*, vol. 1, 703-715 (1969)], *at the very least* the various civil rights acts protected those rights appertaining to *national* citizenship, namely those granted by the federal government by its laws or through its constitution.[26] *See, e.g.*, sources cited and quoted in *Mitchum v. Foster, supra* at 239 and notes 29, 30; *Monroe v. Pape, supra* at 170-71; and *id.* at 205 n. 3, 206 n. 4 (Frankfurter dissenting). *See also Slaughter House Cases, supra.*[27] Just

[26]Thus, §1983 enacted specifically to enforce the Fourteenth Amendment (and titled as such by the Congress), enforced §1 of that Amendment, which forbids the states from abridging any of the "privileges, or immunities of citizens of the United States." See note 24, *supra*.

[27]*Black's Law Dictionary*, 4th ed. (1968), p. 1487, for example, defines "civil rights" as "rights appertaining to a person in virtue of his citizenship in a state or community. Rights capable of being enforced or redressed in a civil action."

as the right not to be deprived of property without due process of law is a "civil right" secured by the Constitution, so then is the right to receive property in the form of AFDC benefits a "civil right" secured by the Social Security Act. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Lynch v. Household Finance Corp., supra* at 552.[28]

Finally, it is beyond question that §1983 "protects" such civil rights. Indeed, that is its very function, and its *only* function. *See Mitchum v. Foster, supra* at 240-42.[29] It protects federal rights by providing civil remedies (equitable and damages) for their deprivation at the hands of state officials, and by providing a federal forum to enforce those rights which may be utilized without regard to the availability of parallel state remedies.[30] In fact, the Act upon which §1983 was

[28]In *Lynch* the Court noted that "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property." *See, generally*, Reich, *the New Property*, 73 *Yale Law J.* 733 (1964).

[29]For example, the Court in *Mitchum*, (at p. 240) quoted from remarks of Rep. Lowe during the 1871 debates: "The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to *protect* the rights, privileges and immunities of citizens... Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." The Court noted (at p. 242) that "[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to *protect* the people from unconstitutional action under color of state law..."

[30]*Preiser v. Rodriquez*, ___ U.S. ___, 93 S.Ct. 1827, 1830 (1973); *Monroe v. Pape, supra* at 183; *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Damico v. California*, 389 U.S. 416 (1967).

modeled, the 1866 Act, was itself explicitly entitled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the means of their vindication" 14 Stat. 27.

The unambiguous applicability of §1343(4) to claims brought under §1983 was recently recognized by this Court. In *Moor v. County of Alameda*, ___ U.S. ___, 93 S.Ct. 1785 (1973), in rejecting a contention that 42 U.S.C. §1988 was an "Act of Congress providing for the protection of civil rights" within the purview of §1343(4), the Court contrasted §1988 with §1983 (and §§1981, 1982, 1985), and held that §1988 "is intended to complement the various acts [such as §1983] which do create federal causes of action for the violation of federal civil rights." *Id.* at 1972.[31] Other courts, specifically addressing the issue presented herein, have given §1343(4) the meaning its words clearly convey. *See e.g., Gomez v. Florida State Employment Service*, 417 F.2d 569, 580, n. 39 (5th Cir. 1969); *Hall v. Garson*, 430 F.2d 430, 438 (5th Cir. 1970); *Worrell v. Sterrett*, 1 CCH Pov. L. Rep. para. 1045.101 (D. Ind. 1970); *Stogner v. Page*, 1 CCH Pov. L. Rep. para. 553.901 (N.D. Ill. 1970); *Bass v. Rockefeller*, 331 F. Supp. 945, 949, n.5 (S.D.N.Y. 1971), *vacated as moot*, 464 F.2d 1300 (2d Cir. 1971).[32] Only

[31]Section 1988 specifies additional remedies which may be used in cases in which "the provisions of this chapter [Civil Rights] and Title 18, for *the protection of all persons* in the United States *in their civil rights*" confer jurisdiction in the district courts (emphasis added).

[32]This Court has twice assumed that §1983 is an "Act of Congress providing for the protection of civil rights" within §1343(4). In both *King v. Smith, supra*, 392 U.S. at 312 n.2, and *Rosado v. Wyman, supra*, 397 U.S. at 403, the Court specifically said that jurisdiction over the constitutional claims brought under §1983 in those cases rested on 1343(3) *and* (4). Section 1343(4),

the second circuit has rejected Appellants' interpretation of §1343(4), but even that court has not done so with any explanation of its reasoning.

Thus, the instant case was dismissed without discussion solely on the authority of *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). *See Hagans v. Wyman, supra*, 471 F.2d 349. *Almenares*, in turn, while finding jurisdiction because of the pleading of a substantial constitutional claim, in *dicta* rejected §1343(4) as a basis for jurisdiction, again without discussion, solely on the authority of *McCall v. Shapiro*, 416 F.2d 246 (2d Cir. 1969). *See Almenares v. Wyman, supra*, 453 F.2d 1082, n. 9. Finally, while *McCall* did discuss the applicability of §1343(4), it rejected it entirely on the basis of the personal liberties/property rights distinction which was later to be adopted by Judge Friendly in his *Eisen v. Eastman* decision [421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970)] and rejected by this Court in *Lynch v. Household Finance Corp., supra. See McCall v. Shapiro, supra*, 416 F.2d at 250.[33]

It is apparent, then, that the language of §1343(4) is so clear that a convincing rationale for rejecting its

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however, provides jurisdiction only to claims under statutes of a certain sort. Unlike 1343(3), it makes no reference to constitutional rights. Consequently, as §1983 is the only statute conceivably relevant to the claims in *King* and *Rosado*, the Court must necessarily have decided that §1983 is an "Act of Congress providing for the protection of civil rights."

[33]Curiously, Judge Friendly, the author of *Almenares* and a member of the panel below, specifically noted in *Eisen* that the holding therein did *not* apply to §1343(4) which "by its letter might be considerably more" than the technical provision certain legislative history would indicate. *Eisen v. Eastman, supra*, 421 F.2d at 562, n.2.

application to §1983 suits has not been found. The only roadblock to jurisdiction under this section which is apparent to Appellants is a brief description of the provision in the House report accompanying the bill in which it was included.[34] The report describes the proposed amendments to §1343 adding subsection (4) as

> "merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceeding section of the bill. The first part of the proposal amends the catch line of a section, and the other section adds a new paragraph setting forth the jurisdiction of the court." U.S. Code Cong. Adm. News, H. Rep. 291, 85 Cong., 1st Sess. 1966, 1976 (1957).

Appellants will demonstrate that this somewhat limited view of §1343(4) is completely out of line with the statutory language used by the Committee and with the legislative history of the eventual enactment of §1343(4), and therefore it should be given no weight by the Court in assessing the true meaning of the provision. Indeed, the absence of any guidance whatsoever for the Court's task inherent in the Committee's description counsels in favor of a construction which is in accord with the plain words chosen.

First, the "preceding section" of the bill (§121) to which the House report refers was *not* enacted.[35] That provision, which authorized the Attorney General to bring civil actions in order to obtain injunctive relief against violations of 42 U.S.C. §1985, was the major bone of contention during the Congressional debates, *see*, generally, Schwartz, *Statutory History of the United*

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[34]H.R. 6127 was enacted as the Civil Rights Act of 1957, 71 Stat. 634, P.L. 85-315.

[35]§1343(4) was originally proposed as §122 of H.R. 6127 and, with §121, appeared in Part III of the bill.

States: Civil Rights, volume 2 (1970) at page 838 and was eliminated by floor amendment prior to Senate passage of the bill, 103 Cong. Rec. 12564-65 (1957). Unless this Court were to assume, contrary to general practice, that Congress enacted §1343(4) without any purpose in mind, to serve no function, *cf. Uptagrafft v. United States*, 315 F.2d 200, 204 (4th Cir.), *cert. denied*, 375 U.S. 818 (1963), the provision must have been intended by the Congress to accomplish something more than the House committee thought was its role. *See General Motors Acceptance Corp. v. Whishant*, 387 F.2d 774, 778 (5th Cir. 1968); *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878).

Indeed, even had the preceding section, §121, been enacted, the House Report's description would not have been reliable. Thus, the very words chosen by the Congress clearly go beyond the ascribed purpose, applying to "*any* Act of Congress" protecting civil rights, not limited to §1985 as are the other provisions of §1343 establishing jurisdiction over §1985 actions brought by private individuals. *See* 28 U.S.C. §1343(1) and §1343(2). Congress surely knew how to use the necessary language to accomplish such a narrow purpose. *Cf. Addison v. Holly Hill*, 322 U.S. 607, 618 (1944). Moreover, if §1343(4) were truly intended to provide only for jurisdiction over the proposed Attorney General actions under §1985, it would have been a totally unnecessary piece of legislation. The district courts were already authorized by 28 U.S.C. §1345[36] to hear such

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[36]28 U.S.C. §1345 provides as follows:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

suits brought by the Attorney General and, moreover, §121, quite apart from §1343(4), included a specific addition to §1985 authorizing suits by the Attorney General to be commenced in the district courts.[37]

Nor could the House report be construed to apply to the only other substantive right which was proposed by H.R. 6127, and which *was* enacted by Congress, namely the amendment to 42 U.S.C. §1971 to prohibit intimidation and coercion which interferes with the right to vote. P.L. 85-315, §131(c), 71 Stat. 637. Section 1343(4) quite unequivocably applies to statutes which protect "civil rights, *including* the right to vote," (emphasis added), *not* just to voting rights. Moreover, as with §121, the new substantive right proposed and enacted by §131 includes a specific grant of district court jurisdiction. *See* 42 U.S.C. §1971(d).

Furthermore, whatever the House Committee may have thought the purpose of §1343(4) to be, there is convincing evidence that the Congress attributed some significance to it. Thus, after House passage, H.R. 6127 was sent to the Senate floor directly in order to bypass the Senate Judiciary Committee. 103 Cong. Rec. 9777 (1957). As noted earlier, significant opposition mounted against Part III of the bill and, on July 16, 1957 an amendment was proposed by Senators Aiken and Ander-

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Since §121 included such an authorization by adding a subparagraph (4) to §1985, §1345 would have afforded jurisdiction.

[37]Section 121 also proposed to add a new subparagraph (5) to §1985 which read as follows:

"The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." H. Rep. no. 291, 85th Cong., 1st Sess. (1957) 22.

son to strike Part III in its entirety. 103 Cong. Rec. 11838 (1957). At the same time, additional opposition to the bill was voiced by senators who feared that the bill would be the occasion for the reactivation and use of Rev. Stats. §1989, 42 U.S.C. §1993, one of the original civil rights acts which authorized the President to use land or naval forces to enforce judicial process or prevent violation of other civil rights statutes.[38] Senators Knowland and Humphrey introduced an amendment to repeal §1993 in order to assuage the fears expressed by Senator Thurmond and others, and thus enhance chances for passage of the bill. 103 Cong. Rec. 12304 (1957).[39]

On July 22, 1957, Senators Aiken and Anderson, in response to an amendment offered by Senator Case, modified their prior amendment to strike Part III in its entirety so as to strike only §121, thus leaving intact §122, the provision which added §1343(4). 103 Cong. Rec. 12284 (1957). When Senator Humphrey asked for an explanation of this modification, Senator Aiken replied:

> "The effect of the modification of the amendment . . . will be to permit members of the Senate to vote for the Knowland-Humphrey amendment, and

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[38]The southern senators feared that the military force provision of §1993 would be used to enforce §121. Senator Thurmond predicted that "(b)y a cross-reference device part III of H.R. 6127, if enacted into law, would be incorporated into one of the sections of the United States code which may be enforced by §1993 . . . . [§1993] has lain dormant for many years, but today some of the proponents of H.R. 6127 still seek to breathe new life into it. They would do this by part III of H.R. 6127, so that troops could be used to integrate southern schools." 103 Cong. Rec. 12299 (1957).

[39]Senator Javits, on the other hand, believed §1993 was not a serious problem, but rather a "straw man" thrown up to block passage of the bill. 103 Cong. Rec. 12307 (1957).

then to vote to strike the objectional [sic] portion of part III without embarrassment.

"As a matter of fact, there should now be no objection by anyone to approving the Knowland-Humphrey amendment." *Id.*[40]

While this explanation falls far short of identifying the purpose of §1343(4) with precision, it does illustrate that the sponsors of the amendment believed that its retention in H.R. 6127 offered something of substance to attract senators to the support of the Knowland-Humphrey amendment. The Knowland-Humphrey amendment was passed on July 22, 1957 after the Aiken modification was made, 103 Cong. Rec. 12314, and the Aiken-Anderson amendment, as modified, passed two days later. 103 Cong. Rec. 12564-66.

One hypothesis that is certainly tenable is that senators supportive of strong civil rights enforcement may have been convinced to support the repeal of a military enforcement provision in exchange for a judicial enforcement provision which would guarantee federal court jurisdiction over all federal civil rights controversies. In any case, it is difficult to imagine, indeed frivolous to suggest, that §1343(4), which the Senate carefully retained, was accepted by the Senate as a "technical amendment" to conform to a provision it had knowingly rejected. As the late Mr. Justice Harlan described another federal statute,

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[40]Senator Case then described §122 as dealing "wholly with the establishment of jurisdiction for Federal courts to entertain suits relating to the right to vote." *Ibid.* Senator Case obviously was making reference to that section's immediate applicability to the amendments to 42 U.S.C. §1971 made by §131 of the bill. Given the language used by the Congress, "civil rights, *including* the right to vote" (emphasis added), it is impossible to read the provision as being *restricted* to the right to vote.

"we have before us a child born of the silent union of legislative compromise. Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding. Our chief resources in this undertaking are the words of the statute and those common sense assumptions that must be made in determining direction without a compass." *Rosado v. Wyman, supra* at 412.

The words of §1343(4) and the common sense assumption that the Senate hardly took special pains to retain §1343(4) sheerly as an exercise, argue for petitioner's suggested interpretation.

Specific legislative support for an interpretation of §1343(4) which would breathe life into the section and leave it more than a useless appendage is available. Thus, shortly after final passage of H.R. 6127 on August 27th in the House, and on August 29th in the Senate, 103 Cong. Rec. 16112, 16478 (1957), (with the Senate's version of Part III accepted), the Senate majority leader, Lyndon Johnson, submitted at the end of the legislative session a summary of the year's work to the Congress. With regard to the provision in question the summary declared that it

"*[e]xtends* the jurisdiction of the district court to include any civil action begun to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote." 103 Cong. Rec. 16620 (1957) (emphasis added).

This is at least some legislative recognition that §1343(4) added something of value to the Judicial Code by

extending federal judicial power.[41] Some further evidence of the purpose of §1343(4) may be gleaned from the title of Part III of P. L. 85-315 in which it was included (as §121), "To strengthen the Civil Rights Statutes, and for Other Purposes." While that title was also used for Part III in the original bill when it included the provision for Attorney General enforcement of 42 U.S.C. §1985, the fact remains that as enacted, Part III included *only* two sections, §121, which added §1343(4), and §122, which repealed 42 U.S.C. §1993. Surely only §121 *strengthened* civil rights statutes, and then, only if given the interpretation sought by Appellants.

Finally, the general thrust of the 1957 Civil Rights Act is relevant to determining the meaning to be given to one of its sections. *See,* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 *Colum. L. Rev.* 527, 538-39 (1947). Apart from the one voting provision in Part IV, 71 Stat. 637, the Act was entirely a procedural one, establishing a Commission on Civil Rights, Part I, 71 Stat. 634, an additional Assistant Attorney General to concentrate on civil rights enforcement, Part II, 71 Stat. 637, and specific enforcement authority in the voting area for the Attorney General, Part IV, 71 Stat. 637. As the House Report indicates, "[t]he provisions of the bill, H.R. 6127, are designed to achieve a more effective enforcement of the rights [already] guaranteed by the Constitution and laws of the United States." U.S. Code Cong. & Adm. News 14 Rep. 29, 85th Cong. 1st Sess. 1966, 1970 (1957). Our interpretation of §1343(4),

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[41]Senator Johnson's description is not unimportant since, contrary to usual practice, there was no conference on the bill, and Johnson met with the Speaker of the House and minority leader to resolve differences between the bodies. *See* 103 Cong. Rec. 16203 (1957).

designed to enhance civil rights enforcement by enlarging federal court jurisdiction, is entirely supportive of the purpose of the legislation.

The Court is not construing §1343(4) on a clean slate. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a suit brought under 42 U.S.C. §1982 against a private corporation which was charged with refusing to sell petitioner a home solely because he was a Negro, the Court held that the district court had jurisdiction to hear the case without regard to the amount in controversy under §1343(4) *Id.* at 412, n. 2. The specific issue resolved in *Jones* was whether §1982 was intended to bar "all racial discrimination, private as well as public, in the sale or rental of property," and if so, whether Congress could constitutionally so provide. *Id.* at 413. In answering these questions in the affirmative, the Court's acceptance of jurisdiction under §1343(4) became significant. No other statute is presently in force which will provide federal jurisdiction over *private* civil rights violations under §1982 (or §1981). 28 U.S.C. §1343(3) is *not* available for this purpose since is expressly serves to provide jurisdiction to redress deprivations only "under color of any state law."

If §1343(4) is too "technical" a provision to provide jurisdiction in §1983 suits, surely it should have been too "technical" to service §1982. The short answer is that Congress intends that *all* civil rights cases be brought in the federal courts, and §1343(4) serves as a ready and logical vehicle to accomplish that purpose.[42]

[42]The Court has also accepted §1343(4) jurisdiction in private cases brought to enforce §5 of the 1965 Voting Rights Act. *See Allen v. Board of Elections*, 393 U.S. 544, 554 (1969). While *Allen* clearly involved a statute "protecting the right to vote", the case is further demonstration that §1343(4) does have utility and is not merely "technical" and related to a proposal not enacted.

C. 28 U.S.C. §1343(3) Provides Federal Jurisdiction for All §1983 Claims.

The district court also properly exercised jurisdiction under 28 U.S.C. §1343(3) independently of the presence of Appellants' constitutional claims. Although the Court has never passed on the issue, *see King v. Smith, supra* at 312 n. 3; *Rosado v. Wyman, supra* at 405 n. 7, the history of §1343(3) and §1983 reveals beyond serious question that Congress did not intend to create a hiatus between the cause of action created by §1983 and the jurisdiction of the federal courts.[43]

The 1871 Civil Rights Act (the predecessor of §1983) had specifically provided that *any* substantive action thereby created could be brought in either the federal district courts or federal circuit courts in the same manner as provided under the Civil Rights Act of 1866,[44] which in turn gave both federal courts jurisdiction for *all* actions created thereunder. Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13. Thus there was at the start a rather clear intent to establish a right to bring any authorized civil rights action against state officials in federal court. In 1875, however, as part of the full scale revision of all federal statutes, the substantive provisions of §1 of the 1871 Act became Rev. Stats. §1979, and the jurisdictional provisions of the Act were codified in two separate provisions. As noted earlier, and as frequently recognized by the Court, Rev. Stats. §1971 (now §1983) enlarged the substantive reach of the 1871 Act by

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[43]Thus, for example, in *Bomar v. Keyes, supra,* Judge Learned Hand simply assumed (or thought the point so obvious as to require no discussion), that §1343(3) provided a jurisdictional basis for any §1983 suit.

[44]Act of April 9, 1866, ch. 31, §3, 14 Stat. 27.

including federal "laws" as subject to its remedy. Consistent with the original scheme in 1871, however, federal jurisdiction was maintained for all §1983 cases.

Thus, Rev. Stats. 563(12) authorized district court jurisdiction:

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom or usage of any state, of any right, privilege, or immunity secured by the Constitution of the United States, or by any right secured by any law of the United States to persons within the jurisdiction thereof." (emphasis added).

At the same time, Rev. Stats. §629(16) authorized circuit court jurisdiction in identical terms for constitutional claims, but instead of the broad "any law of the United States" language of §563(12), §629(16) went on to include jurisdiction for suits to redress rights under "any law providing for equal rights." Had §563(12) been the model for the current §1343(3) there would be no question regarding jurisdiction over statutory-based §1983 actions. Unfortunately, however, it was §629(16) with its arguably narrower "equal rights" reference that was used by the revisers of the Judicial Code in 1910. Act of March 3, 1911, ch. 231, 36 Stat. 1087. Petitioners submit that considerations of statutory language, legislative purpose and policy in both 1875 and 1911 suggest that the Congress did not intend to limit the availability of a federal forum in any §1983 cases.

First, recognizing that the original 1871 Act gave concurrent jurisdiction to the district and

circuit courts, one would expect some mention or discussion by the revisers as to any decision to limit circuit court power, if that was indeed their intention. Yet there is none, whereas the marginal notes to both §563(12) and 629(16) contain identical description of the provisions as pertaining simply to "suits to redress deprivation of rights secured by the Constitution and laws", and both provisions were cross-referenced to §§1977 and 1979 of the Revised Statutes (now 42 U.S.C. §1981 and 1983).[45] Appellants submit that §629(16) was intended to have the same breadth as §563(12), and given the unimpeachable clarity of the latter section ("any law of the United States"), to be coextensive with §1983.

The 1910 revision and consolidation again offers no specific explanation for the choice of the "equal rights" language. The scant legislative history supports the conclusion that Congress intended to provide jurisdiction for all actions authorized by §1983. The Senate Report explained its proposed §24(14) of the Judicial Code (later transferred to Title 28, §1343(3)) as follows:

> "This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts." S. Rep. No. 388, 61st Cong., 2nd Sess. pt. 1 at 15 (1910).

Section 1983 jurisdiction was not "limited", or "narrowed", but "merged" and "vested" in the district

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courts. Again, given the clarity of §563(12) and failure to explain the purported limitation we can only conclude that none was intended and that *all* §1983 claims were continued to be authorized in the federal courts without regard to amount in controversy.[46]

Thus, throughout the long history of these statutes every indication is that the scope of the jurisdictional statute is as great as its substantive counterpart. That the change of 1910 took place amidst a general revision of the judicial code suggests even more strongly that Congress did not intend to change the jurisdictional framework to create a gap between the substantive action and jurisdiction to hear it. Any such result would be

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[46]Original federal question jurisdiction was given the federal courts in 1875, Act of March 3, 1875, 18 Stat. 470, the same year in which the predecessor of §1983 was enlarged to include state deprivations of federal statutory rights. In *Lynch v. Household Finance Corp., supra,* the Court found no indication in the legislative history that the provision of general federal question jurisdiction was intended to narrow the scope of the 1871 Civil Rights Act, particularly noting the simultaneous expansion of §1983. 405 U.S. at 548 and n.15. The Court further noted that when Congress increased the amount in controversy requirement in 1911 (to $3000), 36 Stat. 1091, "there was no indication that jurisdiction under what is now §1343(3) was to be reduced," and indeed Congress had "explicitly preserved the exemption" for §1343(3)'s predecessor. *Id. See also* S. Rep. No. 388, pt. 1, 61st Cong., 2nd Sess. 11 (1910). But that 1911 Act was the very same statute which merged the district court and circuit court jurisdiction for §1983 civil right cases. Since until that enactment the district courts expressly had jurisdiction under §563(12) for suits seeking redress for *all* federal statutory deprivations by state officials, without regard to amount in controversy, it would be surprising at the very least for Congress to have so obliquely reversed its course in light of its expressed intention not to subject federal jurisdiction elsewhere provided to the jurisdictional amount requirement.

anomalous indeed. A specific federal remedy for equitable and legal relief is created, part of which cannot be enforced in a federal court.[47] Appellants do not believe such an anomalous consequence is compelled. Section 1983 is itself a statute providing "equal rights", and hence §1343(3) does not create a gap between itself and §1983.

The 1871 Civil Rights Act was, after all, "An Act to enforce the Provisions of the Fourteenth Amendment" as major an "equal rights" document as can be imagined. The Act grew out of President Grant's message to Congress on March 23, 1871 which noted the absence of effective law enforcement in many states and recommended

> "Such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States . . ." Cong. Globe, 42nd Cong., 1st Sess., p. 244.

In the debates on the 1871 Act, unmistakeable concern was demonstrated over the activities of the Ku Klux Klan and the nonfeasance of state government authorities in failing to enforce the federal rights guaranteed to the newly emancipated Negroes by the Fourteenth Amendment. *See generally, Monroe v. Pape, supra* at 172-180. As the Court in *Monroe* observed, "[i]t was not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.' " *Id.* at 174, 176. It was the "lack of enforcement"

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[47]See section D, *infra* for a discussion of the major equitable considerations arguing in favor of a construction of §1343 which would parallel §1983.

of state law to protect American citizens "that was the nub of the difficulty." *Id.* at 176.

Senator Pratt's remarks, quoted in *Monroe* (at p. 178) demonstrate the function of §1983 as an "equal rights" measure. Speaking of discrimination against Union sympathizers and Negroes in state law enforcement, he said:

> "Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.
>
> But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples." Cong. Globe, 42nd Cong., 1st Sess. 505.

Representative Hoar further stated that "[t]he principle danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the Civil and equal rights which the General Government is endeavoring to secure to them." Cong. Globe, 42nd Cong., 1st Sess. App. 335. As the Court recently observed, the post-Civil War enactments, particularly §1983, clearly established "the role of the Federal Government as a guarantor of basic federal rights against state power." *Mitchum v. Foster, supra* at 239. Section 1983, by providing a federal remedy and federal

forum secured for those unable to obtain it from the state courts, equal treatment before the law.

That §1983 goes further than guaranteeing racial equality before the law is, in light of this history, not at all inconsistent with its role as a guarantor of "equal rights". Having observed the lawlessness of state officials, and the inability of one class of citizens to enforce federal rights, Congress was persuaded to give sweeping protection to *all* persons whose federal rights are denied, *see, District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *Monroe v. Pape, supra* at 175-76, and to do so without regard in a particular case as to whether the state would or would not enforce the federal right, *see, e.g., Preiser v. Rodriguez, supra.* Section 1983 therefore, is a law "that confer[s] equal rights in the sense, vital to our way of life, of bestowing them upon all." *Georgia v. Rachel,* 384 U.S. 780, 792 (1966).

Appellee-State, in its brief in opposition to certiorari (at 14), relies on the Court's decision in *Georgia v. Rachel, supra,* as dispositive against our interpretation of the phrase "Act of Congress providing for equal rights." That case involved the interpretation of a similar phrase, "law providing for equal civil rights," used in 28 U.S.C. §1443(1), the civil rights removal provision. Tracing the original removal provision back to §3 of the 1866 Civil Rights Act, 14 Stat. 27, which provided for removal only in cases involving the express statutory rights of racial equality guaranteed in §1 of that Act itself, *Georgia v. Rachel, supra* at 790, the Court held that use of the term "equal civil rights" by the 1874 revisers was intended "to mean any law providing for specific civil rights stated in terms of racial equality." *Id.* at 792. So construed, the Court held that the due process clause of the Fourteenth Amendment, the First Amendment, and §1983, are not included within its terms. *Id.*

While the construction of §1443(1) in *Rachel* is relevant, it is certainly not determinative of the issue in this case. As the Court noted in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932):

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed and the circumstances under which the language was employed."

The Court has not hesitated to apply these sound principles to the task of construction of the various civil rights statutes. Thus, in *Monroe v. Pape, supra*, although the Court had previously construed the phrase "any right or privilege secured . . . by the Constitution or laws" in 18 U.S.C. §241 to comprehend only rights arising from the relationship of the individual to the federal government, *see United States v. Williams*, 341 U.S. 70 (1951) it construed the related phrase in §1983 to comprehend *all* Fourteenth Amendment rights. *Monroe v. Pape, supra*

at 170; and 205-08 (Frankfurter, dissenting). Similarly, in *District of Columbia v. Carter, supra* at 420-421, the Court construed the phrase "State or Territory" as used in §1983 as excluding the District of Columbia despite *Hurd v. Hodges*, 334 U.S. 24 (1948) having previously construed the same phrase in §1982 as including the District. See 409 U.S. at 420-421. In both *Monroe* and *Carter*, the Court looked to the historical origins of the currently effective provisions, the purposes such original measures were intended to accomplish, and the different constitutional sources of power upon which they were based, in order to reach its conclusions. Such an analysis of §1443(1) and §1343(3) compels the conclusion that "Acts of Congress providing for equal rights" in §1343(3) was not intended to restrict that section to racial equality statutes.

Section 1443(1), as noted, was derived from the 1866 Civil Rights Act. There can be no doubt that the entire 1866 Act focused on racial inequality. That Act sought to implement the Thirteenth Amendment. The 1866 Act was Congress' initial attempt to erradicate some of the "badges of slavery" which it had been able to identify. *See, e.g., Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 439-40. Criminal punishment meted out on the basis of race was probably as pernicious a badge of slavery as can be imagined. In sharp contrast, however, §1343(3), (along with §1983), originated with the 1871 Act, was an enforcement of the Fourteenth Amendment, and was specifically designed, as was the Amendment itself, to reach deprivations of federal rights beyond those cast in racial terms.

Also critical to determining Congressional intent in this regard is the role played by §1443(1) in the civil rights enforcement scheme. It is a removal provision, applicable

to civil suits *and* criminal prosecutions, *cf. Monroe v. Pape, supra* at 206 (Frankfurter concurring) and by its very nature is designed not only to oust state courts of their power to act in a particular case, *cf. Mitchum v. Foster, supra,* but to decide the case as well. A greater source of friction between federal and state sovereignties is difficult to imagine.

Indeed, recognizing the implications of removal, in the companion case to *Rachel* the Court gave to the phrase in §1443, "denied or cannot enforce in the courts of such State a right under [an equal rights law]" a very narrow interpretation which left to the state courts

> "the vindication of the defendant's federal rights . . . except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in state court." *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966).[48]

In contrast to removal, the civil remedy authorized by the 1871 Act, one which is supplementary to any state remedy for redress of civil rights deprivations, *see McNeese v. Board of Education, supra; Monroe v. Pape, supra,* is far less drastic. Indeed, the availability of a civil §1983 remedy was itself persuasive to the court in *Greenwood* that its interpretation of §1443 was not destructive of federal rights. "[U]nder . . . §1983 . . . officers may be made to respond in damages not only for violations of rights conferred by federal equal civil right laws, but *for violations of other federal*

[48]The Court's limiting construction of §1443 was also influenced by the likely impact a liberal interpretation would have on the work of the federal court. *Id.* at 832. No such overburdening effect will be the result of a generous interpretation of §1343.

constitutional and statutory rights as well." *Id.* at 829-30. [Emphasis added].

In sum, despite the "potential breadth" the Court in *Rachel* saw in the term "equal rights", it had sound historical and practical reasons for giving it less than its broadest meaning in the context of §1443. The considerations under §1343 compel a different result.

D. Practical and Policy Considerations Support the Conclusion That §1343 Was Intended To Provide Federal Jurisdiction for All §1983 Suits.

The most compelling consideration for interpreting §1343 so as not to leave a gap between it and §1983 is that the primary, if not exclusive, purpose of §1983 was to provide a federal judicial remedy for state inspired transgressions of federally created or guaranteed rights. As noted above, §1 of the 1871 Act specifically provided for federal court jurisdiction in all cases thereunder. As summarized by the court just last term:

> "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster, supra* at 239.[49]

The need for the intervention of the federal judiciary was manifest. As Justice Frankfurter observed in *Monroe v. Pape, supra* at 252, "a powerful impulse behind the creation of this 'substantive' right was the

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[49] *See also Mitchum* at 240, citing to the debates on the Act. Representative Lowe, for example, specifically noted that "this bill throws open the doors of the United States courts. . . ."

purpose that it be available, in, and be shaped through, original federal tribunals." As the *Monroe* majority concluded:

> "One reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. at 180.

Of course, in construing Congressional intent 100 years ago, the continued validity of its assumptions is not relevant. On the other hand, while state courts may not be guilty of the gross disregard of federal rights as was demonstrated to be the case in some states in 1871, there are nonetheless many important reasons applicable today for permitting plaintiffs to use a federal forum to redress their federally created rights, some of them rather similar to the considerations of the prior century. Welfare cases are a good example. In the wake of the recent hardening of attitudes toward welfare on the part of state legislatures and elected officials with widespread adverse publicity of welfare abuses, state courts are likely to be subject to subtle, hard-to-prove prejudice and political pressures that in practice deprive recipients of an adequate state forum. *See, e.g.*, Reagan, *Welfare is a Cancer, New York Times,* April 1, 1971, at 41, col. 3-5.[50]

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[50]It is the very potential of such prejudice that §1983 was directed. While racial prejudice may be a factor in the administration of state welfare programs, Cf. *Jefferson v. Hackney,* 406 U.S. 535 (1972), today another prejudice against recipients exists, one directed against supposed "social freeloaders". In *New York Department of Social Services v. Dublino,* 93 S.Ct. 2507, 2522 (1973), Mr. Justice Marshall, dissenting, wrote: "It is widely yet

Apart from the potential hostility to federal welfare claims, it cannot be denied that federal statutory rights are often created by complex statutes which require some degree of familiarity to understand and apply. The Social Security Act is a perfect example. Federal judges are appropriate to that task, especially if, as it is, securing uniformity of construction is an important requirement. Moreover, in a case such as this with a federal cabinet agency maintaining an interest in the disposition,[51] a federal forum will undoubtedly facilitate its participation so that its views can be made known. *See Rosado v. Wyman, supra,* 397 U.S. at 407.[52] Indeed, the federal courts have a special role to play in welfare cases, namely to insure that federal funds allocated by Congress are used as Congress has directed. *See Rosado v. Wyman, supra* at 420-22. As in *Rosado,* the appropriate remedial order in some cases may actually be a cut-off of

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erroneously believed, for example, that recipients of public assistance have little desire to become self-supporting. See, e.g., L. Goodwin, *Do the Poor Want to Work*? 5.51-52, 112 (1972). Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions."

[51]HEW's interest, of course, would have been of little use to plaintiffs had they not commenced suit. Thus, despite a determination that New York's policy is illegal under federal law, the agency has taken no steps whatsoever to exercise its administrative powers under 42 U.S.C. §604. Recipients still do not have the right to "trigger" such HEW enforcement; *see Rosado v. Wyman, supra* at 406, which if taken would ultimately give the federal courts power to review the controversy as Congress intends anyway. See 42 U.S.C. §1316; 5 U.S.C. §701 *et seq.*

[52]In welfare cases, when HEW submits an *amicus* brief it does so through the United States Attorney for the district. Not infrequently state agencies seek to join HEW in welfare litigation, also facilitated by a federal forum.

federal funds [although in this case such a remedy was unnecessary; *see, e.g., King v. Smith supra; Townsend v. Swank, supra*], one that only a federal court should order.

An adverse ruling to petitioners may not simply mean that state judicial relief will have to be pursued as an alternative remedy. Some states have filing fee requirements which will preclude recipients from bringing such an action. *See Ortwein v. Schwab*, ____U.S. ___ , 93 S.Ct. 1123, 1172 (1973). *Cf.* 28 U.S.C. §1915. Moreover, an important feature of §1983 is the authorization for equitable relief which may not have been available in the courts of all the states when §1983 was enacted, *cf. Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 404 (1972) [Harlan concurring], and which may still not be available to the same extent as in federal court. A holding that some §1983 cases may not be brought in federal court may thus mean that adequate relief will not be available at all since the states are obligated to enforce federal law only insofar as their courts have jurisdiction over such suits. *See, e.g., Testa v. Katt*, 330 U.S. 386 (1947).

Finally, an interpretation of §1343 as providing jurisdiction for all §1983 suits would not result in a flood of federal court litigation. Many federal statutes have specific remedial provisions which must be complied with in order to effectuate the substantive right. Presumably such provisions would be interpreted to bar §1983 suits thereunder; *see Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir. 1950), or at least Congress could so provide, *cf. United States v. Johnson*, 390 U.S. 563 (1968); *Preiser v. Rodriguez, supra.*

Second, only those federal statutory claims which arise from a deprivation "under color of state law" will be actionable under §1983. Other federal statutory claims will still be subject to the general federal question jurisdiction provision, 28 U.S.C. 1331, or the multitude of special jurisdictional provisions, *e.g.*, 28 U.S.C. 1337.[53] In a case such as this, with the proper administration of millions of dollars of federal funds by state officials ultimately at issue,[54] it makes little sense to apply the jurisdictional amount requirement. While each member of plaintiffs' class asserts a claim for only a few hundred dollars, the case is not the "petty controversy" Congress seeks to keep from the federal courts by imposing a jurisdictional amount requirement. *See* S. Rep. No. 1830, 85th Cong., 2d Sess. at 3-4 (1958).[55]

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[53]Indeed, this may well be the only class of federal question cases involving an important regulatory program subject to §1331. Congress surely did not intend such a result.

[54]New York receives all of its AFDC funds only in return for a pledge to obey all categorical grant requirements such as §§402(a)(7) and (10).

[55]This is not to say §1331 will never be available to welfare recipients. Often their claim may be "common and undivided" permitting aggregation; see, e.g., *Bass v. Rockefeller, supra* or the dispute may involve the right to future benefits which exceed $10,000; see, e.g., *Aetna Casualty Co. v. Flowers*, 330 U.S. 464 (1947).

CONCLUSION

The Court should hold that the complaint herein presents substantial federal questions and the district court had jurisdiction of this case pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. The judgment of the court below should be reversed, and the case remanded to that court for further proceedings.

Respectfully submitted,

CARL JAY NATHANSON
Nassau County Law Services
Committee, Inc.
285 Fulton Avenue
Hempstead, New York 11550
[516] 292-8100

STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare
Policy and Law Inc.
25 West 43rd Street
New York, New York 10036

Attorneys for Petitioners

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CYNTHIA HAGENS, *et al.*,
Plaintiffs,

-against-

GEORGE K. WYMAN, *et al.*,
Defendants.

Civil Action No.
72-C-182

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

This brief is submitted in response to the Court's invitation to the Department of Health, Education, and Welfare on July 19, 1972 to participate in this action as *amicus curiae.*

Plaintiffs have challenged the validity of a New York State welfare regulation which permits the state to advance certain welfare payments to families which are in danger of eviction from their homes because of non-payment of rent and requires the state to recoup these advanced sums by reducing the amount of the families' welfare checks over the succeeding six months, until the advanced sum has been thereby recovered. The regulation, 18 N.Y.C.R.R. §352.7(g)(7), provides in part that:

> For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

On March 3, 1972, this Court permanently enjoined the state from implementing and enforcing that regulation. The United States Court of Appeals for the Second Circuit vacated that order and remanded the case to this court for further consideration on June 5, 1972.

Two issues were presented by the Court of Appeals for consideration upon remand: first, whether the New York recoupment policy violates sections 402(a)(7) and 402(a)(10) of the Social Security Act, 42 U.S.C. 602(a)(7) and 602(a)(10), and applicable HEW regulations, and, second, whether such recoupment constitutes a reduction in grant so as to require the state to provide affected recipients with an opportunity for a fair hearing. The discussion in this brief is directed primarily to the first question, whether the recoupment provided for in the New York regulation contravenes federal requirements.

HEW believes that the New York regulation does contravene federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months.[1] The Social Security Act does not permit the assumption, without proof that income which might have been available to a recipient in past months is still available. Instead, the actual availability of such income is the controlling test. The Act provides only for federal assistance with respect to state payments for current needs which have been determined to exist in the month for which the payment is made. It does not permit accelerated payments or repayable loans, which is,

[1] The New York regulation in issue has been submitted to HEW as part of the New York state plan. HEW has not approved the plan provision and has apprised the state that the provision does not comport with federal requirements. (See Appendix A).

effectively, the characterization, which New York places upon such payments under 18 N.Y.C.R.R. 352.7(g)(7). The Social Security Act does not require states to provide such emergency payments as are authorized under the New York regulation, but if they do so, they must abide by the federal requirements governing determination of the availability of income and determination of need on an objective and equitable basis. The Act does provide, however, other mechanisms for attacking the emergency housing problems to which the New York regulation is addressed, including protective payments and emergency assistance.

DISCUSSION

I.

SECTION 352.7(g)(7) ASSUMES THE EXISTENCE OF RESOURCES NOT CURRENTLY AVAILABLE FOR THE SUPPORT OF THE RECIPIENT, THEREBY CONTRAVENING SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT AND IMPLEMENTING FEDERAL REGULATIONS GOVERNING THE CONSIDERATION OF INCOME, 45 C.F.R. 233.20(a)(3)(ii)(c).

Public assistance, generally, is a "residual" program, designed to provide financial aid for unmet subsistence needs after other income and resources have been taken into account. The public assistance programs under the Social Security Act were enacted to provide federal funds to states for assistance granted by the states to certain specified categories of needy individuals. The Act sets out certain conditions that a state plan for AABD or AFDC[2]

[2]Plaintiffs in this case are recipients of Aid to Families with Dependent Children (AFDC) under the New York State AFDC program, established pursuant to Title IV or the Social Security Act, 42 U.S.C. 601 *et seq.* However, since §352.7(g)(7) applies both to the state's AFDC program, and its combination assistance

must meet in order to qualify for federal funding; however, the state determines the standard of need applicable to individuals eligible for assistance under the programs and the degree to which the state will meet that need. See *King v. Smith*, 392 U.S. 309, 318-319 (1968); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

The title IV and XVI programs are designed to offer financial support for individuals who are "needy". 42 U.S.C. 601, 606(a). This condition of eligibility for assistance under the programs necessarily involves evaluation as to the individual's needs and his means to satisfy them. Section 402(a)(7) of the Act, 42 U.S.C. 602(a)(7) requires that a state, in determining need, shall

> take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . .

A similar provision of the Act applies to state plans for AABD at 42 U.S.C. 1382(a)(14).

Although the statute does not contain a more explicit formula for determining need, it seems clear that Congress did not intend that welfare be given to individuals with sufficient means to maintain themselves: hence, the requirement that the states, in determining need, take into consideration the individual recipient's income and resources. On the other hand, Congress surely did not intend that individuals covered under the AFDC and AABD programs be charged with income and resources which are merely assumed to be at their disposal. Thus, HEW believes that while states are required to consider the individual's income and resources, they may consider

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program for adults, Aid to the Aged, Blind and Disabled (AABD), established pursuant to Title XVI of the Act, 42 U.S.C. §1381 *et seq.*, reference is made in this brief to its applicability to both programs.

only those items which the recipient actually has at his disposal. Thus, HEW has consistently interpreted these sections as permitting the states to consider as available to the recipient only income and resources which are actually at the recipient's disposal in a particular month, and as disallowing states from creating presumptions of availability of income. 45 C.F.R. 233.20(a)(3)(ii). 45 C.F.R. 233.20(a)(3)(ii)(*c*) states that a state plan for AFDC and AABD must provide that, in establishing financial eligibility and the amount of the assistance grant,

> only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

The Supreme Court has upheld HEW's interpretation of 42 U.S.C. 602(a)(7) as embodied in the regulation (and its predecessor provisions) on a number of occasions. In *King v. Smith*, 392 U.S. 309 (1968), the Court held that Alabama could not find a child ineligible for AFDC simply because of the presence in his home of a "substitute father" who was presumed to support the child regardless of whether he did so in fact. While the Court found that any regular and actual contributions from the substitute father toward the child's support could be considered in determining the need of the child, it rejected the state's contention that the state could assume, without proof, that such income was being provided to the child. Relying heavily on the HEW Handbook of Public Assistance Administration (now superseded by 45 C.F.R. 233.20(a)(3)(ii)(*c*)), the Court stated:

> Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under §602 to those "that are,

> in fact, available to an applicant or recipient for current use on a regular basis. . . ." This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual. (392 U.S. at 319, n.16.)

Again, in *Lewis v. Martin*, 397 U.S. 552, at 559 (1970), the Supreme Court upheld the validity of the HEW regulation, leaving no doubt that it considered the HEW interpretation of 42 U.S.C. 602(a)(7) to be clearly justifiable. Similarly, in *Amos v. Engelman*, 333 F. Supp. 1109 (D.N.J. 1970), aff'd. 404 U.S. 23 (1971), the Supreme Court in effect re-affirmed the imprimatur which it had previously placed upon the HEW assumption-of-income rule in its earlier decisions. Although the Court did not address the issue specifically, it re-affirmed the decision of the district court on this point:

> We do, however, conclude that wherever New Jersey uses the income of a stepfather or paramour without proof of its availability, it violates the federal statute. *Lewis v. Martin, supra.* This is true although there is no provision in the New Jersey regulation like the one in California which conclusively presumes the needs of the children are reduced by the amount of income from the man in the house. (333 F. Supp. 1119)

The issue presented here as to whether recoupment violates federal standards is much the same as that presented in *Acosta v. Swank*, 312 F. Supp. 765 (N.D. Ill. 1970); 318 F. Supp. 1348 (N.D. Ill. 1970), which involved a "duplicate assistance" payment system under which the state recovered, by means of deductions from subsequent assistance checks, amounts furnished as emergency disbursals for food and clothing. In that case, the Court ruled initially that the Illinois "duplicate assist-

ance" policy did not deny plaintiffs equal protection of the law and was not in conflict with 45 C.F.R. 233.20(a)(3)(ii)(*c*). 312 F. Supp. 765. On rehearing, after HEW had filed a brief as *amicus curiae* in which it took the position that the Illinois regulations contravened federal requirements, the court withdrew its earlier decision, noting that as a result of negotiations with HEW, the state had amended its policy so as to conform with the HEW regulation:

> The court finds implicit in the above statements the admission that when this court's opinion was filed there was a conflict between the Illinois Department of Public Aid "duplicate assistance" policy and HEW regulations; and further finds that its opinion of May 11, 1970 should be and it is hereby withdrawn. (318 F. Supp. 1349-1350)

The critical issue to be determined in the present case revolves around the meaning of the term "available". HEW believes that in those instances in which the state recoups from the recipient's assistance check the amount which the recipient has previously received as an advance rent allowance pursuant to section 352.7(g)(7), it in effect assumes that the funds extended to a recipient to meet an emergency in one month remain available for his support in a subsequent six-month period. This sort of assumption of income availability violates a central tenet of the federal program. An emergency disbursal for rent is issued to meet an actual current need of the recipient. The basis for federal matching of such a disbursal at the time it is made is that it will be spent to satisfy only a need which exists in the month for which the assistance is granted, not that it will be used to permit the recipient to accumulate savings. The Social Security Act does not permit accelerated payments or repayable loans. It deals only in terms of present need, as determined each month.

Although New York apparently claims that its policy is merely an administrative device for recovering excess assistance, the underlying rationale and necessary effect of the policy nevertheless is to assume that the emergency disbursal, which was made to meet current needs, remains available to the recipient in later months, thereby producing the very result which the HEW regulation is designed to prevent. The regulation seeks to prevent the states from relying upon presumptions about the availability of income in any month without proof of the validity of the presumption in each particular case.[3]

Moreover, for purposes of claiming federal matching funds, New York treats these disbursals as correct payments. Federal funds can be utilized only to match payments of assistance, but not payments otherwise characterized, such as loans. There is, then, no reason to treat these disbursals differently from any other correct payment.

Finally, we would emphasize the words of the Social Security Act. The state agency, in determining need, shall

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[3]One application of the general principle that the state may consider only actually available income and resources in determining need is found in 45 C.F.R. §233.20(a)(3)(ii)(d) which provides that states may not recover overpayments of assistance for any month by reductions in future assistance checks unless the recipient has at his disposal resources equal to the amount of the proposed reduction (except where caused by the recipient's wilful failure to disclose relevant information). That regulatory provision is not directly involved here. However, it does present an instructive analogy for the instant case. If the state's right to recover overpayments, which by definition are mistaken payments to the recipient exceeding his needs for that month, is so restricted, it is even more important that the state not be allowed to recover an emergency payment which was correctly issued to meet an actual present need by a device that considers income or resources not in fact available to the recipient.

take into consideration any *other* income and resources. 42 U.S.C. 602(a)(7) 1382(a)(14). Assistance which was correctly paid in the past is not to be taken into consideration.

B. 18 N.Y.C.R.R. §352.7(g)(7) is inconsistent with the federal requirement in section 402(a)(10) of the Social Security Act and implementing federal regulations that assistance be paid to all eligible individuals.

The New York policy is also inconsistent with other provisions of the Social Security Act and regulations dealing with the amount of the assistance payment. Section 402(a)(10) of the Act, 42 U.S.C. 602(a)(10).

* * * requires that a state AFDC plan must provided that:

> all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . .

A similar requirement is imposed on AABD plans by 42 U.S.C. 1382(a)(8). Federal regulations on need and amount of assistance, 45 CFR §233.20(a)(1), establish as an overriding general principle that a state AFDC and AABD plan must

> Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an equitable and objective basis and all types of income will be taken into consideration in the same way, except when otherwise specifically authorized by Federal statute.

More particularly, these provisions have been interpreted by HEW to require formal procedures for determination

of eligibility and the amount of the assistance check. Part IV, Section 5200, of the Handbook of Public Assistance Administration which covers the authorization of award provides that:

> The authorization of award serves the dual purpose of certifying eligibility and signifying the agency's decision to grant assistance in a specified amount. The authorization of award thus becomes a matter of formal agency record which certifies that the recipient has met the conditions set forth for eligibility and extent of need, and that, *unless and until those conditions are changed or the recipient's circumstances change, the recipient may look to the agency to fulfill its expressed intention to make regular payments in the amount awarded.* (Emphasis added).

The award authorization is made when the state agency acts favorably on an individual's application. When the amount of the award is changed, federal regulations require prior notice and opportunity for hearing.

Thus, although the states have a great degree of discretion in determining the standard of need of individuals covered by the various public assistance programs and the degree to which the state will meet that need, once the state has made its determination in regard to a particular individual or family, it is bound by its initial determination until it formally concludes that a change in circumstances warrants a redetermination. The state must treat all individuals fairly, equitably, and according to formal procedures in the process of assessing eligibility and amount of assistance payment. Moreover, all individuals with the same needs and the same income and resources must be dealt with in the same manner.

The emergency housing cost disbursals at issue here are provided at state option. The state does not have to make

such payments, but if it does, it must do so equitably, in accordance with formal procedures. The New York policy results in situations in which, in some months, the recipient receives an assistance payment that is lower than the amount of the authorized award. Yet, the state has made no redetermination of award on the basis of changed circumstances. Nor should such a redetermination have been made, since the recipient is still as needy. Indeed, the only time the recipient's circumstances changed was months earlier, and then for the worse.

C. The New York regulation frustrates the primary purposes of the Act

It has been argued that the New York recoupment policy is designed to deter mismanagement of the assistance grant by recipients. There can be no doubt that the state has a valid interest in dealing effectively with situations in which recipients are unable to manage their assistance checks. A recipient who constantly requires emergency aid because of mismanagement uses state public assistance funds which could be given to recipients who manage them properly. HEW does not question the validity of the state interest in avoiding this result, but only the fact that the means chosen to accomplish this interest conflict with a primary purpose of the Act and effectively punish the needy child for parental mismanagement. If the purpose of the AFDC program were to train needy individuals in the proper techniques of money management, the New York advance or duplicate assistance policy might not present a problem. However, that is not a primary purpose of the Act.

Congress has clearly stated in section 401 of the Social Security Act, 42 U.S.C. 601, that the purpose of the AFDC program is to enable the states to provide needy, dependent children with financial assistance and social

services. The Supreme Court has found that states may not pursue other interests in connection with the AFDC program by means which frustrate this primary purpose. In *King v. Smith, supra,* Alabama defended its "substitute father" policy on the grounds that it served a valid state interest in discouraging immorality and illegitimacy. The Court stated:

> "In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that *protection of such children is the paramount goal of AFDC.*" (392 U.S. at 325.) (Emphasis added)

Similar rationale was used in *Cooper v. Laupheimer,* 316 F. Supp. 264 (E.D. Pa. 1970), in which the court invalidated a Pennsylvania regulation providing for the recovery of duplicate assistance checks by reductions in the amount of future checks:

> "[The State policy] punishes the child by depriving him of a substantial portion of AFDC assistance which he is eligible to receive because his mother mistakenly or fraudulently obtained an extra payment months ago. The State has a legal right to recover from the mother funds which she was not entitled to receive, but it cannot recover these funds by reducing current assistance to the child. The target and primary beneficiary of AFDC aid is the child; the mother is merely the conduit through which the funds are channeled to the child . . . the state cannot permit a child to starve or be deprived of aid that he needs because of the mother's budgetary mismanagement . . ." (316 F. Supp. at 269.)

The necessary effect of the New York policy is to reduce the amount of aid available for the support of the

needy child in those months in which reductions are made to recover the amount of the prior emergency payment. This necessarily means that, during that period, the needy child or children must survive on an amount that falls below the standard of need established by the state. Yet, the needy child has not mismanaged the past assistance payment or in any conscious way created the need for emergency assistance. For this reason, HEW feels that it is clearly contrary to the purposes of the AFDC program to deprive the child by causing a reduction in the current assistance check in order to achieve state interests, in this case, teaching proper money management to welfare recipients and providing for efficient utilization of limited state public assistance funds, that can be achieved in ways that do not run contrary to the purposes of the program. Other such methods are provided for in the Act. These are discussed in part D of this brief.

D. The purposes of the New York policy can be served by alternative means provided for under the Social Security Act.

Federal law and regulations provide means by which the state can protect itself against duplicate payments such as are involved here. Congress has recognized that recipient mismanagement is a pressing problem which must be solved in a way that will forward the purposes of the AFDC program. Section 406(b) of the Act, 42 U.S.C. 606(b) authorizes federal matching for protective payments made "to another individual who . . . is interested in or concerned with the welfare of such child . . . ," and for vendor payments made directly to a person furnishing food, living accommodations, or other goods, services, or items. In enacting the Social Security Amendments of

1967 (which made mechanisms for protective and vendor payments mandatory on the states),[4] Congress indicated clearly that this provision was "a tool to deal with an infrequent but persistent problem of misuse of assistance money." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101-102 (1967). The record indicates that New York is in fact using this method of payment.

Title XVI also authorizes federal matching for protective payments for the aged, blind and disabled (but not vendor payments). Section 1605(a) of the Act, 42 U.S.C. 1385(a).

A second means for handling such situations for needy families with children is by provision of "emergency assistance", which may be matched by federal funds pursuant to Section 406(e) of the Social Security Act, 42 U.S.C. 606(e). Emergency assistance is designed to take care of the same sort of situations which §352.7(g)(7) covers, such as a recipient's loss of his home. New York has statutory authority for such assistance already in place. Section 350-j of the New York Social Services Law provides in part:

> 3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department to children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home,

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[4]The requirement under section 402(a)(15)(B)(ii) of the Act, 42 U.S.C. 602(a)(15)(B)(ii), that states have provisions for protective and vendor payments for Title IV non-WIN cases was repealed by Pub. L. 92-223, §3(a)(1) (December 28, 1971), effective July 1, 1972. States may now at their option provide or not for protective and vendor payments in such cases, with federal matching.

and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment.

E. Recoupment under 18 N.Y.C.R.R. §352.7 (g)(7) represents a reduction of the assistance grant for purposes of the fair hearing regulations.

The recoupment provided for under the New York regulation would thus be a "reduction" of assistance within the meaning of federal regulations requiring fair hearings in cases in which the grant is reduced, suspended, or terminated. 45 C.F.R. 205.10. Therefore, such recoupment may not properly be made without 15 days' advance notice of the intended reduction. However, as discussed, the recipient should not be required to resort to a state agency fair hearing, which would in any event be futile in light of the New York policy. Instead, the issue should be resolved by decision in this case that, insofar as New York does reduce the grant in this manner, it is violating federal standards.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

December 29, 1971

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, New York 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352g(6), cited as 352g(7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352.g(7) and adds a new subdivision (g) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments "may" be made of subsequent grants. Regulation 352.7(g)(1) providing for the handling of rent payments subsequent to fraudulent claims of non-receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5 (Protective Payments).

If it is felt that discussion of any of the foregoing is indicated, staff of the Regional Office is available.

Sincerely yours,

Elmer W. Smith
Regional Commissioner

P:bf

cc: Mr. Smith
Mr. B. Luger
Audit Agency